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Criminal Restitution Proposals in the 110th Congress

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Summary

Restitution legislation in the 110th Congress falls into three categories. Some proposals, such as the gang crime bills, create new federal crimes or amend specific existing federal offenses and in doing so include restitution provisions particular to those offenses, e.g., H.R. 880, H.R. 1582, H.R. 1692, S. 456, and S. 990 (gang bills); and H.R. 871 (spousal support). Other proposals address a particular aspect of the law such as abatement which limits restitution collection after the defendant's death (S. 149). Two bills – H.R. 845, the Criminal Restitution Improvement Act, and S. 973, the Restitution for Victims of Crime Act – make substantial changes in federal restitution law. The proposals call for three kinds of adjustments: (1) an expansion of offenses for which restitution may be ordered without recourse to the laws relating to probation and supervised release; (2) an overhaul of the procedures governing the issuance and enforcement of restitution orders to afford prosecutors greater enforcement flexibility without having to seek the approval of the sentencing court; and (3) authority for preindictment and presentencing restraining orders and other protective measures to prevent dissipation of assets by those who may subsequently owe restitution. Although similar in many respects, S. 973 more closely resembles the proposals transmitted by the Justice Department. The provisions of H.R. 845 also appear as Title V of the Violent Crime Control Act of 2007 (H.R. 3156/S. 1860).

This report is available in an abridged form – without footnotes, citations to most authorities and appendices – as CRS Report RS22709, *Criminal Restitution in the 110th Congress: A Sketch*. Related reports include CRS Report RL34138, *Restitution in Federal Criminal Cases*, available in abridged form as CRS Report RS22708, *Restitution in Federal Criminal Cases: A Sketch*, all by Charles Doyle.

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Introduction

Restitution is the act of restoring an individual or entity in whole or in part to the lost circumstances they might have once enjoyed. In a federal criminal context, it is the order of a sentencing court directing a defendant to reimburse or otherwise compensate the victims of his crimes.[1] Federal courts have no inherent authority to award restitution; they may do so only pursuant to statute.[2]

There are four general statutory sources of such authority. Under 18 U.S.C. 3663A, federal courts must order restitution when sentencing a defendant convicted of a crime of violence, of a crime against property or fraud or deceit that is proscribed in Title 18 of the United States Code, of maintaining drug-involved premises, or of product tampering. Under 18 U.S.C. 3663, if restitution is not otherwise mandatory under Section 3663A, federal courts may nonetheless order restitution when sentencing a defendant convicted of an offense proscribed in Title 18 of the United States Code or of various drug or aviation safety offenses. Under 18 U.S.C. 3563(b)(2), federal courts may make restitution a condition of probation.[3] Under 18 U.S.C. 3583(d), they may make restitution a condition of supervised release.[4] There are a handful of statutes that contain special restitution coverage for losses associated with particular crimes such as the failure to provide child support, 18 U.S.C. 228(d). The procedure for the exercise and implementation of federal restitution authority is set forth in large measure in 18 U.S.C. 3664, 18 U.S.C. 3611-3614, and to a lesser extent in 18 U.S.C. 3572.

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[1] BLACK'S LAW DICTIONARY, 1339 (8th ed. 2004).

[2] *United States v. Reifler*, 446 F.3d 65, 127 (2d Cir. 2006); *United States v. Love*, 431 F.3d 477, 479 (5th Cir. 2005); *United States v. Mitchell*, 429 F.3d 952, 961 (10th Cir. 2005); *United States v. Rand*, 403 F.3d 489, 493 (7th Cir. 2005).

[3] By statute, probation is not a sentencing option where the defendant has been convicted of a class A or class B felony (i.e., felonies punishable by death, life imprisonment, or some maximum term of imprisonment of at least 25 years), 18 U.S.C. 3561, 3581. The Sentencing Guidelines are more restrictive and recommend against sentencing a defendant to probation for any crime for which the top of the recommended sentencing guideline range is more than imprisonment for one year, U.S.S.G. §5B1.1.

[4] By statute when sentencing a defendant the court may also impose a term of supervised release to be served upon the defendant's release from prison, 18 U.S.C. 3583. The Sentencing Guidelines recommend a term of supervised release whenever the defendant is sentenced to imprisonment for one year or more, U.S.S.G. §5D1.2.

Restitution is based on the losses suffered by the victims of a crime. Neither the defendant's financial condition at the time of sentencing, nor his future economic prospects figure in the amount of restitution awarded. Consequently, in some cases, particularly those in which a restitution order is mandatory, the amount of restitution ordered may exceed what the defendant can ever reasonably be expected to pay.[5] Nevertheless, there have been suggestions that in other instances insufficient restitution has been ordered or collected because of the particularities of restitution law.[6]

Restitution legislation in the 110th Congress falls into three categories. Some proposals such as the gang crime bills create new federal crimes or amend specific existing federal offenses and in doing so include restitution provisions particular to those offenses. Other proposals address the consequences of abatement. Still others call for more general revisions of existing law in the area.

Restitution for New Crimes

Gang Crimes

Existing federal law outlaws the commission of various federal crimes by street gangs.[7] There have been a number of proposals to amend or augment the existing federal offense. They include H.R. 880 (Representative Forbes), H.R. 1582 (Representative Schiff), H.R. 1692 (Representative Pallone), S. 456 (Senator Feinstein), S. 990 (Senator Menendez). In each instance, the proposals permit the courts to order restitution as part of the sentence imposed for violation of their newly created or newly amended offenses.[8]

Spousal Support

Existing federal law outlaws certain failures to pay child support and requires the court to award restitution upon conviction.[9] H.R. 871 (Representative Wexler)

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[5] United States Government Accountability Office, *Criminal Debt: Court-Ordered Restitution Amounts Far Exceed Likely Collections for the Crime Victims in Selected Financial Fraud Cases*, 2 (January 2005)("[T]he collection of outstanding criminal debt is inherently difficult due to a number of factors, including the nature of the debt, in that it involves criminals who may be incarcerated, may have been deported, or may have minimal earning capacity; [and] the MVRA requirement that the assessment of restitution be based on actual loss and not on an offender's ability to pay...").

[6] 153 *Cong. Rec.* S3627 (daily ed. March 22, 2007).

[7] 18 U.S.C. 521.

[8] Proposed 18 U.S.C. 3663(c)(4): H.R. 880 (sec. 101(b)), H.R. 1582 (sec. 101(b)), H.R. 1692 (sec. 304(h)), S. 456 (sec. 101(b)), S. 990 (sec. 304(h)).

[9] 18 U.S.C. 228.

proposes to outlaw the failure to pay court-ordered spousal property distribution and requires the court to award restitution upon conviction.[10]

Individual Restitution Fixes

Abatement

On October 17, 2006, a federal district court in Houston, Texas, vacated the conviction of, and dismissed the indictment of, former Enron executive Kenneth Lay. At the same time, it refused to order restitution for the victims of the crimes for which he had been convicted.[11] Mr. Lay had died shortly after his conviction and the court felt that the doctrine of abatement recognized by the Fifth Circuit compelled its action.[12]

The Supreme Court once observed that the lower federal courts had consistently and correctly held that "death pending direct review of a criminal conviction abates not only the appeal but also all proceedings had in the prosecution from its inception," *Durham v. United States*, 401 U.S. 481 (1971). While its earlier practice had been to dismiss and remand upon the death of a petitioner pending a grant of certiorari, the *Durham* Court indicated that it did not consider important the distinction between death pending appeal and death pending a petition for certiorari, *Id.* at 483 n.* Later and without further explanation, the Court dismissed the petition for certiorari of a man who had died while his petition was pending. In doing so, it expressly overruled *Durham* to the extent of any inconsistency, *Dove v. United States*, 423 U.S. 325 (1976).[13]

Since then, the lower federal courts have read *Dove* to mean that abatement does not apply to petitions for certiorari, but have continued to adhere to their earlier general rule on abatement: upon the death of a defendant pending appeal the courts treat his indictment and conviction as if they had never occurred. The case is returned to the lower federal court with instructions to vacate the conviction and to dismiss the indictment.[14] The circuit courts are somewhat more divided on the

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[10] Proposed 18 U.S.C. 228A.

[11] *United States v. Lay*, 456 F.Supp.2d 869, 870 (S.D. Tex. 2006).

[12] *Id*. at 873-75.

[13] The entire *Dove* per curiam opinion reads as follows, "The Court is advised that the petitioner died at New Bern, N.C., on November 14, 1974. The petition for certiorari is therefore dismissed. To the extent that *Durham v. United States*, 401 U.S. 481 (1972), may be inconsistent with ruling, *Durham* is overruled. *It is so ordered*," 423 U.S. at 325.

[14] *United States v. Estate of Parsons*, 367 F.3d 409, 413 (5th Cir. 2004)(en banc), citing, *United States v. Wright*, 160 F.3d 905, 908 (2d Cir. 1998); *United States v. Logal*, 106 F.3d 1547, 1551 (11th Cir. 1997); *United States v. Davis*, 953 F.2d 1482, 1486 (10th Cir. 1992); *United States v. Wilcox*, 783 F.2d 44, 44 (6th Cir. 1986); *United States v. Oberlin*, 718 F.2d 894, 895 (9th Cir. 1983); *United States v. Pauline*, 625 F.2d 684, 685 (5th Cir. 1980); and *United States v. Moehlenkamp*, 557 F.2d 126, 128 (7th Cir. 1977). *See also, United States v. Christopher*, 273 F.3d 294, 297 (3d Cir. 2001); *United States v. Pogue*, 19 F.3d 663, 666

question of whether a restitution order likewise abates upon the death of the defendant pending appeal.[15]

In the twilight of the 109th Congress, the Senate passed legislation that would have barred abatement of a restitution order.[16] The bill's sponsor, Senator Feinstein, re-introduced essentially the same proposal as S. 149 in the 110th Congress.[17] Except for restitution and civil forfeiture, S. 149 replicates common law abatement for sentencing purposes.[18] The obligation to pay fines and special assessments and apparently to honor conditions of probation or supervised release dies with the defendant.[19] S. 149 does not, however, obligate the government to return funds received in payment of the defendant's fine, special assessment or criminal forfeiture.[20] For civil forfeitures,[21] S. 149 eases the applicable statute of limitations and denies the application of abatement doctrine to civil forfeiture cases.[22]

(D.C. Cir. 1994); *United States v. Dudley*, 739 F.2d 175, 176 (4th Cir. 1984); *United States v. Littlefield*, 594 F.2d 682, 683 (8th Cir. 1979).

[15] *United States v. Estate of Parsons*, 367 F.3d at 415 ("According regardless of its purpose, the order of restitution cannot stand in the wake of Parsons's death. Because he now is deemed never to have been convicted or even charged, the order restitution abates *ab initio*"); *accord*, *United States v. Logal*, 106 F.3d at 1552; *but see*, *United States v. Christopher*, 273 F.3d at 299("We conclude that the order of restitution in this case is more compensatory in nature than penal. Historically, restitution, an equitable remedy, was intended to reimburse a person wronged by the actions of another. To absolve the estate from refunding the fruits of the wrongdoing would grant an undeserved windfall. We are persuaded that abatement should not apply to the order of restitution in this case, and thus, it survives against the estate of the deceased convict."); *accord*, *United States v. Dudley*, 739 F.2d at 178; *United States v. Pogue*, 19 F.3d at 665 ("Because the government has conceded that Pogue's estate has no assets against which any claim for restitution might be advanced, any questions concerning the survival of the restitution order raises a moot issue. We offer no opinion on this issue.").

[16] S. 4055, passed by unanimous consent, 152 *Cong. Rec.* S11840841 (daily ed. December 8, 2006).

[17] Text and introductory statement at 153 *Cong. Rec.* S.138-40 (daily ed. January 4, 2007).

[18] Proposed 18 U.S.C. 3560(b)(2)(i)("The death of a defendant after a sentence has been announced or a judgment has been entered, and before that defendant has exhausted or waived the right to a direct appeal – (i) shall terminate any term of probation, supervision, or imprisonment, and shall terminate the liability of that defendant to pay any amount remaining due of a criminal forfeiture, of a fine under Section 3613(b), or of a special assessment under Section 3013").

[19] Id.

[20] Proposed 18 U.S.C. 3560(b)(2)(B)(ii). This appears to be the case under existing law, *United States v. Schumann*, 861 F.2d 1234, 1236 (11th Cir. 1988).

[21] Civil forfeiture is confiscation accomplished not as part of the criminal prosecution against the property owner but under a civil procedure ordinarily conducted *in rem* where the property is treated as the defendant, where confiscation turns upon whether the property is shown to have the statutorily required nexus to a particular crime, and where the owner's guilt or innocence is not necessarily relevant, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974).

[22] Proposed 18 U.S.C. 3560(e)("(1) Except as provided in paragraph (2), the death of an individual does not affect the government's ability to seek, or to continue to pursue, civil

For restitution, it essentially ignores the defendant's death. More precisely, it allows for substitution of the defendant's representative and permits restitution-related proceedings to continue as if the defendant were still alive. If the defendant, dies after conviction but before being sentenced, S. 149 authorizes a sentencing hearing and restitution order, with little said about exactly what procedures are to be followed.[23] Thereafter, or if the defendant dies after having been sentenced, the appellate process remains open to the defendant's representative, victims, and the government for restitution-related matters.[24]

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forfeiture of property as authorized by law. (2) Notwithstanding the expiration of any civil forfeiture statute of limitations or any time limitation set forth in Section 983(a) of this title, not later than the later of those time period otherwise authorized by law and two years after the date of the death of an individual against whom a criminal indictment alleging forfeiture is pending, the Government may commence civil forfeiture proceedings against any interest in any property alleged to be forfeitable in the indictment of that individual.").

There is some indication that civil forfeitures may not abate under existing law, *United States v. 10380 S.W. 28th Street (Borroto)*, 214 F.3d 1291, 1294 (11th Cir. 2000)("These abatement cases involving criminal defendants have never been applied to civil forfeiture cases under 21 U.S.C. 881(a)(7). It is doubtful that the rationale which governs the decision in criminal cases would ever be applied to a civil forfeiture.").

[23] Proposed 18 U.S.C. 3560(b)(3)(A)("If a defendant dies after a plea of guilty or nolo contendere has been accepted or a verdict has been returned and before a sentence has been announced, the court shall, upon a motion under subsection (c)(2) by the government or any victim of that defendant's crime, commence a special restitution proceeding at which the court shall adjudicate and enter a final order of restitution against the estate of that defendant in an amount equal to the amount that would have been imposed if that defendant were alive"). S. 149 does provide for victim notification, for the appointment of representation of the deceased, and relaxes deadlines accordingly, proposed 18 U.S.C. 3560(d). Yet silence greets the question of whether the court and probation officer must or may otherwise proceed as if the defendant were still alive.

[24] Proposed 18 U.S.C. 3560(c)(2)("(A) If a defendant dies after being convicted in a criminal case but prior to sentencing or the exhaustion or waiver of direct appeal, the personal representative of that defendant , the government, or any victim of that defendant's crime may file or pursue an otherwise permissible direct appeal, petition for mandamus or a writ of certiorari, or an otherwise permissible motion described in Section 3663, 3663A, 3664, or 3771, to the extent that the appeal, petition, or motion raises an otherwise permissible claim to – (i) obtain in a special restitution proceeding, a final order of restitution under subsection (b)(3); (ii) enforce, correct, amend, adjust, reinstate, or challenge any order of restitution; or (iii) challenge or reinstate a verdict, plea of guilty or nolo contendere, sentence, or judgment on which – (I) a restitution order is based; or (II) restitution is being or will be sought by an appeal, petition, or motion under this paragraph.

"(B) If a defendant dies after being convicted in a criminal case but prior to sentencing or the exhaustion or waiver of direct appeal, the personal representative of that defendant, the government, or any victim of that defendant's crime may file or pursue an otherwise permissible direct appeal, petition for mandamus or a writ of certiorari, or an otherwise permissible motion under the Federal Rules of Criminal Procedure, to the extent that the appeal, petition, or motion raises an otherwise permissible claim to challenge or reinstate a verdict plea of guilty or nolo contendere, sentence, or judgment that the appellant, petitioner, or movant shows by a preponderance of the evidence is, or will be, material in a pending or reasonably anticipated civil proceeding, including civil forfeiture proceedings.")

The abatement doctrine does not apply when the defendant dies after all appeals have been exhausted, but S. 149 addresses the question. It allows for the issuance or continuation of any protective orders designed to prevent dissipation of assets that might be used to pay restitution.[25] Even more interestingly, it seems to establish a collection method reminiscent of forfeiture of estate and corruption of the blood:

> If restitution has not been fully collected on the date on which a defendant convicted in a criminal case dies – (i) any amount owed under a restitution order (whether issued before or after the death of that defendant) shall be collectible from any property from which the restitution could have been collected if that defendant had survived, *regardless of whether that property is included in the estate of the defendant*.[26]

The provision seems straightforward enough for property or property interests held by the defendant at the time of his death. It becomes more intriguing for property or property interests that would otherwise have passed through the defendant to his heirs at some point after his death.

The Constitution denies Congress the power to punish treason with corruption of the blood or forfeiture of estate.[27] Story lays out the background and reasons for the prohibition in his COMMENTARIES:

> It is well known, that corruption of blood, and forfeiture of the estate of the offender followed, as a necessary consequence at common law upon every attainder of treason. By corruption of blood all inheritable qualities are destroyed; so, that an attainted person can neither inherit lands, nor other hereditament from his ancestors, not retain those, he is already in possession of, nor transmit them to any heir. And this destruction of all inheritable qualities is so complete, that it obstructs all descents to his posterity, whenever they are obliged to derive a title through him to any estate of a remote ancestor. So, that if a father commits treason, and is attainted, and suffers death, and then the grandfather dies, his grandson cannot inherit any estate from his grandfather; for he must claim through his father, who could convey to him no inheritable blood.... In addition, to this most grievous disability, the person attainted forfeits, by the common law, all his lands, and tenements, and rights of entry, and rights of profits in lands or tenements, which he possesses.... But this view of the subject is wholly unsatisfactory. It looks only to the offender himself, and is regardless of his innocent posterity. It really operates, as a posthumous punishment upon them; and compels them to bear, not only the disgrace naturally attendant upon such flagitious crimes; but takes from them the common rights and privileges enjoyed by all other citizens, where they are wholly innocent, and

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[25] Proposed 18 U.S.C. 3560(d)(2)(D)("If restitution has not been fully collected on the date on which a defendant convicted in a criminal case dies ... (ii) any restitution protective order in effect on the date of the death of that defendant shall continue in effect unless modified by the court after hearing or pursuant to a motion by the personal representative of that defendant, the Government, or any victim of that defendant's crime; and (iii) upon motion by the Government or any victim of that defendant's crime the court shall taken any action necessary to preserve the availability of property for restitution under this section.").

[26] Proposed 18 U.S.C. 3560(d)(2)(D)(i)(emphasis added).

[27] "The Congress shall have power to declare the punishment for treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attained," U.S. Const. Art. III, §3, cl.2.

> however remote they may be in the lineage from the first offender. III STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 170-71, 172 (1833).

Some courts have suggested that the due process clause embodies a comparable proscription against the use of forfeiture of estate and corruption of the blood as a punishment for other crimes.[28] This view may gather some support from the fact that when the first Congress assembled it enacted a similar proscription for other crimes which continued in place for almost two centuries.[29]

S. 149 has one other interesting feature. Its amendments are effective with respect to "any criminal case or appeal pending on or after July 1, 2007," that is, to crimes occurring prior to that date as long as the prosecution or appeal are still pending then. The ex post facto clause of the Constitution generally forbids the retroactive application of criminal laws.[30] The lower federal appellate courts are divided over the question of whether the Constitution's ex post facto clause permits retroactive application of restitution amendments.[31]

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[28] E.g., *United States v. Grande*, 620 F.2d 1026, 1038 (4th Cir. 1980)("We would agree with Berg that if §1963 revives forfeiture of estate as that concept was expressed in the Constitution it is almost certainly invalid because of the irrationality of a ruling that forfeiture of estate cannot be imposed for treason but can be imposed for a pattern of less crimes").

[29] 1 STAT. 117 (1790)("That no conviction or judgment for any of the offenses aforesaid, shall work corruption of blood, or any forfeiture of estate"); *see also*, REV. STAT. §5326 (1876)("No conviction or judgment shall work corruption of blood or any forfeiture of estate"); 18 U.S.C. 3563 (1964 ed.)(same). Forfeiture of estate involves confiscation of all of the offender's property with no greater nexus to the crime than ownership by the offender; statutory forfeiture involves the confiscation of property derived from and used to facilitate the commission of a particular crime, *Austin v. United States*, 509 U.S. 602, 611-13 (1993). Nevertheless, Congress repealed the prohibition out of an apparent fear of inconsistency when it established the statutory criminal forfeiture that applies to property relating to racketeering offenses, S.Rept. 91-617 at 80 (1969).

[30] U.S. Const. art. I, §9("No ... ex post facto law shall be passed"), *see also*, U.S. Const. Art. I, §10 (No state shall ... pass any ... ex post facto law); *Stogner v. California*, 539 U.S. 607, 612 (2003), citing, *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-91 (1798)(Ex post facto clauses prohibit "1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender").

[31] *United States v. Leahy*, 438 F.3d 328, 335 (3d Cir. 2006)(ex post facto clause applies); *accord, United States v. Grice*, 319 F.3d 1174, 1177 (9th Cir. 2003); *United States v. Schulte*, 264 F.3d 656, 662 (6th Cir. 2001); *United States v. Siegel*, 153 F.3d 1256, 1260 (11th Cir. 1998); *United States v. Bapack*, 129 F.3d 1320, 1327 n.13 (D.C. Cir. 1997); *United States v. Williams*, 128 F.3d 1239, 1241 (8th Cir. 1997); *United States v. Thompson*, 113 F.3d 13, 15, n.1 (2d Cir. 1997); *United States v. Rico Industries, Inc.*, 854 F.2d 710, 714 (5th Cir. 1988); *contra*, *United States v. Baldwin*, 414 F.3d 791, 800 (7th Cir. 2005); *United States v. Nichols*, 169 F.3d 1255, 1279-280 (10th Cir. 1999).

General Revisions

Two bills – H.R. 845, the Criminal Restitution Improvement Act, introduced by Representative Chabot, and S. 973, the Restitution for Victims of Crime Act, introduced by Senator Dorgan – make substantial changes in federal restitution law.[32] The bills reflect a Justice Department legislative proposal transmitted in the second session of the 109th Congress in identical letters to then House Speaker Hastert and to the President of the Senate, Vice President Cheney, which included a draft bill and accompanying section-by-section analysis.[33] The proposals call for three kinds of modifications: (1) an expansion of offenses for which restitution may be ordered without recourse to the laws relating to probation and supervised release; (2) an overhaul of the procedures governing the issuance and enforcement of restitution orders to afford prosecutors greater enforcement flexibility without having to seek the approval of the sentencing court; and (3) authority for preconviction and presentencing restraining orders and other protective measures to prevent dissipation of assets by those who may subsequently owe restitution. Although similar in many respects, S. 973 more closely resembles the proposals transmitted by the Justice Department.

H.R. 845 increases the number of crimes for which mandatory restitution is authorized; S. 973 the number for which discretionary restitution is authorized. They use virtually identical language to establish a protective order mechanism in order to prevent the dissipation of assets prior to conviction that might otherwise be available for purposes of restitution. While H.R. 845 recasts 18 U.S.C. 3664 which governs much of how federal restitution orders are crafted and executed, S. 973 takes a more selective approach, weaving its alterations into the fabric of existing statute.

H.R. 845 (Mandatory Restitution)

H.R. 845 replaces the discretionary and mandatory restitution provisions of sections 3663 and 3663A with mandatory provisions under a revised Section 3663. In doing so, it changes the class of victims for whom restitution must be ordered; it changes the crimes for which restitution must be ordered; and it changes the types of injuries and losses for which restitution must be ordered.

Qualifying Offenses. Existing law requires restitution for crimes of violence, maintaining a drug-involved premises, and, when prohibited in Title 18, fraud and crimes against property.[34] It permits a court to order restitution for crimes otherwise proscribed in Title 18, as well as various aviation safety and drug offenses, and as a

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[32] The proposals found in H.R. 845 also appear as Title V of the Violent Crime Control Act of 2007 (H.R. 3156 (Rep. Lamar Smith)/S. 1860 (Sen. Cornyn)).

[33] Letters to Honorable J. Dennis Hastert, Speaker, U.S. House of Representatives and Richard B. Cheney, President, U.S. Senate from Ass't Att'y Gen. William E. Moschella, dated May 25, 2006. The letters, draft bill and analysis are cited below as the *Letter*, *Draft Bill*, and *Analysis*, respectively. They were available on June 27, 2007 at [http://www.usdoj.gov/olp/pdf/052506_ltrs_to_ hastert_cheney.pdf].

[34] 18 U.S.C. 3663A.

condition for probation and supervised release.[35] It does not permit restitution orders in the case of most securities offenses, environmental offenses, drug offenses, or most of the other property crimes outlawed in other titles of the Code.

H.R. 845 requires restitution for all federal offenses: "The court shall order a convicted defendant to make restitution for all pecuniary loss to identifiable victims, including pecuniary loss resulting from physical injury to, or the death of, another, proximately resulting from the offense."[36] Other than through its definition of "victim" (person suffering a pecuniary loss proximately caused by an offense) and its description of types of injuries and loss its covers (pecuniary losses including those related to physical injury proximately caused by an offense), H.R. 845 does not further define the "offenses" that require mandatory restitution. It almost certainly is intended to cover any criminal offense proscribed by Act of Congress and triable before a court established under Article III of the Constitution. The suggestion that it is also intended to embrace tribal, military, and/or territorial offenses and/or relevant conduct related to any qualifying offenses seems conceivable but not very likely.[37]

Qualifying Victims. Existing law defines "victims" for purposes of mandatory restitution under Section 3663A as (1) those designated victims in a plea agreement, (2) the estate of deceased victims, (3) those directly and proximately harmed by a qualifying offense, (4) those harmed by the scheme, conspiracy, or pattern of criminal activity of a defendant convicted of a qualifying offense which has as one of its elements such a scheme, conspiracy, or pattern of criminal activity, and (5) in the case of children, the incompetent, incapacitated, or deceased: legal guardians, family members, and other representatives.[38]

H.R. 845 describes somewhat differently the five classes of victims who are entitled to mandatory restitution:

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[35] 18 U.S.C. 3663, 3563(b), 3583(d).

[36] Proposed 18 U.S.C. 3663(a).

[37] In the setting arguably most comparable, the federal law governing bail defines "offense" as "any criminal offense, other than an offense triable by court-martial, military commission, provost court, or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by Act of Congress," 18 U.S.C. 3156(a)(2).

The Speedy Trial Act uses a similar but slightly more narrow definition: "As used in this chapter ... the term 'offense' means any federal criminal offense which is in violation of an Act of Congress and is triable in any court established by Act of Congress (other than a Class B or C misdemeanor or an infraction, or an offense triable by court-martial, military commission, provost court, or other military tribunal)," 18 U.S.C. 3172(2).

The United States Sentencing Guidelines is more expansive and defines "offense" as "the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context..." U.S.S.G. §1B1.1 *Application Note* 1.(H). Of course, the Guidelines are only applicable to the federal criminal justice system, i.e., to any federal criminal offense which is in violation of an Act of Congress and is triable in any court established by Act of Congress, 28 U.S.C. 991(b)(1); 18 U.S.C. 3553, 3551.

[38] 18 U.S.C. 3663A(a)(3), (1), (2).

- Identifiable individuals and entities who suffer a pecuniary loss proximately caused by the offense[39],
- Identifiable individuals and entities who suffer a pecuniary loss as a consequence of a physical injury to another proximately caused by the offense,[40]
- The successors to any such direct or third party victims,[41]
- Anyone the parties agree to in a plea bargain,[42] and
- Anyone otherwise provided by law[43].

Like existing law, H.R. 845 permits restitution for a wider range of victims pursuant to a plea bargain.[44] Furthermore, H.R. 845 insists upon restitution for those who suffer losses as a proximate cause of a qualifying offense, even though it envisions a wider range of qualifying offenses than recognized under existing law.[45] Third, in somewhat varied terms, H.R. 845 admits to the possibility that, faced with a host of victims or an exceedingly complex factual environment, full restitution for all victims need not be required.[46]

Perhaps the most obvious difference produced by H.R. 845's description of the victims entitled to restitution is its silence on the extent to which victims of

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[39] Proposed 18 U.S.C. 3663(a), (b)(2)(A).

[40] Id.

[41] Id.

[42] Proposed 18 U.S.C. 3663(b)(2)(B).

[43] Id.

[44] Proposed 18 U.S.C. 3663(b)(2)(B)("As used in this section and section 3664, the term 'victim' means ... (B) others, as agreed to in a plea agreement ...").

18 U.S.C. 3663A(a)(3)("The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense").

[45] Proposed 18 U.S.C. 3663(a)("The court shall order a convicted defendant to make restitution for all pecuniary loss to identifiable victims ... proximately resulting from the offense").

18 U.S.C. 3663A(a)("... when sentencing a defendant convicted of an offense described in subsection (c), the court shall order ... that the defendant make restitution to the victim of the offense.... For purposes of this section, the term 'victim' means a person directly and proximately harmed as a result of the commission of the offense for which restitution may be ordered ...").

[46] Proposed 18 U.S.C. 3663(e)("The court shall provide as complete a restitution to as many victims as possible, though not the full restitution to all victims otherwise required by this section, to the extent the court finds on the record that – (1) the number of identifiable victims is so large as to make restitution impracticable; or (2) determining complex issues of fact related to the cause or amount of a victim's losses would complicate or prolong the sentencing process to such a degree that the need to provide restitution to that victim is outweighed by the burden on the sentencing process").

18 U.S.C. 3663A(c)(3)("This section shall not apply in the case of an offense described in paragraph (1)(A)(ii)[relating to fraud and property damage offenses] if the court finds, from facts on the record, that – (A) the number of identifiable victims is so large as to make restitution impracticable; or (B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process").

misconduct collateral to the crime of conviction may be entitled to restitution. Section 3663A now requires restitution for a limited class of individuals who are not victims of the defendant's crime of conviction strictly speaking. That is, it recognizes as a victim entitled to restitution "any person directly harmed by the defendant's criminal conduct in the course of [a] scheme, conspiracy or pattern," if the offense "involves as an element a scheme, conspiracy, or pattern of criminal activity."[47] Under this provision, victims of the same scheme but of a different episode of the scheme than that for which the defendant was convicted may be entitled to restitution.[48] There is no comparable language in H.R. 845.

The second major difference flows from H.R. 845's depiction of those who do not fit the traditional concept of primary victims, but who are entitled to restitution nonetheless. Existing law treats a victim's estate as the victim if the victim is dead.[49] If the victim is a child, incompetent, or incapacitated, existing law allows the victim's legal guardian, a member of the victim's family, or a court appointed representative to assume the victim's interest.[50] Existing law also realizes that parents, insurance carriers, and other third parties who assume or provide compensation for the victim's losses, may be entitled to restitution.[51]

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[47] 18 U.S.C. 3663A(a)(2).

[48] *United States v. Belk*, 435 F.3d 817, 819 (7th Cir. 2006)("The crime covered by §1341is the *scheme* to defraud, not (just) the mailings that occur in the course of the scheme; This indictment laid out, and the Injury convicted Belk of, a multi-year scheme to defraud Rogge's brokerage. The eight mailings [listed in the indictment] were just overt acts. Restitution for the whole scheme is in order"); *United States v. Dickerson*, 370 F.3d 1330, 1342 (11th Cir. 2004) ("Therefore, we hold that where a defendant is convicted of a crime of which a scheme is an element, the district court must under 18 U.S.C. 3663A, order the defendant to pay restitution to all victims for the losses they suffered from the defendant's conduct in the course of the scheme, even where such losses were caused by conduct outside of the statute of limitations."); *see also, United States v. Osborne*, 332 F.3d 1307, 1314 (10th Cir 2003)("the losses caused by the entire conspiracy, not just the losses caused by those acts committed by the defendant, can be attributed to the defendant when the district court orders restitution"); *United States v. Bright*, 353 F.3d 1114, 1120 (9th Cir. 2004)("Bright similarly pled guilty to multiple counts of mail fraud, thus acknowledging his participation in a scheme to defraud. The district court therefore properly ordered restitution for losses caused by the dismissed conduct related to this scheme"); *but see, United States v. Polichemi*, 219 F.3d 698, 714 (7th Cir. 2000)(defendant convicted of fraud may nevertheless not be ordered to pay restitution to victims harmed by conduct for which he was acquitted).

[49] 18 U.S.C. 3663A(a)(1).

[50] 18 U.S.C. 3663A(a)(2).

[51] 18 U.S.C. 3664(j)(1)(insurance carriers and other sources of compensation); *see also, United States v. Johnson*, 400 F.3d 187, 199-201(4th Cir. 2005)("a district court properly orders restitution to be paid to a third party when the party bears the cost of providing necessary medical care to a victim of a covered offense who suffered bodily injury as a result of the offense"); *United States v. Hayward*, 359 F.3d 631, 642 (3d Cir. 2004)(restitution order for the parents whose children had been transported to London for illicit sexual purposes with the terse observation that the parents "incurred reasonable costs in obtaining the return of their victimized children from London and in making their children available to participate in the investigation and trial. The restitution order will therefore be affirmed").

H.R. 845 replicates the provision of existing law covering insurance carriers and similarly situated third parties and when restitution takes the form of in-kind services,[52] but otherwise speaks simply of successors and those who suffer losses as a result of physical injuries to another proximately caused by defendant's crime.[53] H.R. 845 makes no express mention of the victim's estate or representative or of the assumption of the victim's rights.

Some courts may feel that the change is intended to mean that the right of victims to restitution dies with them,[54] although their parents and estates may be entitled to restitution for related costs which they incur.[55] On the other hand, it may be that the bill contemplates that the estate and heirs of a deceased victim will be considered the victim's "successors," and therefore entitled to restitution in the victim's stead.[56] Conversely, at least in the case of human victims, the classification of successors as victims may be intended to signal no more than the fact that victims may assign their right to restitution, if only during their lifetime.[57]

H.R. 845 does classify as victims those who are otherwise provided for by law.[58] It repeals some, but not all, of the existing individual restitution statutes that provide alternative coverage. Gone are the individual restitution statutes governing human trafficking, sexual abuse, sexual exploitation of children, domestic violence, and telemarketing fraud.[59] Continuing on are the probation, supervised release, or animal enterprise restitution provisions.[60] Victims as defined in the survivors statutes, and other similarly situated statutes are presumably what is meant H.R. 845 speaks of victims as otherwise provided by law.

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[52] Proposed 18 U.S.C. 3664(n)(1)(" ... If a victim receives compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation ..."); proposed 18 U.S.C. 3664(*o*)("An in-kind payment may be in the form of return of property, replacement of property, or if the victim agrees, services rendered to the victim or a person or organization other than the victim").

[53] Proposed 18 U.S.C. 3663(b)(2)("... the term 'victim' means (A) each identifiable person or entity suffering the pecuniary loss (and any successor to that person or entity")); proposed 18 U.S.C. 3663(a)("The court shall order a convicted defendant to make restitution for ... pecuniary loss resulting from physical injury to, or the death of, another, proximately resulting from the offense").

[54] In civil cases, the death of the defendant may discharge the right of the victim to recover further damages, *see*, RESTATEMENT (SECOND) OF TORTS §§900(1)(a), 926 (1977).

[55] "The court shall order a convicted defendant to make restitution for all ... pecuniary loss resulting from injury to or the death of another, proximately resulting from the offense," proposed 18 U.S.C. 3663(a).

[56] "As used in this section and section 3664, the term 'victim' means – (A) each identifiable person or entity suffering the pecuniary loss (and any successor to that person or entity)..." proposed 18 U.S.C. 3663(b)(2)(A).

[57] In a later section, the bill expressly authorizes victims to assign their rights to restitution to the Crime Victims Fund, proposed 18 U.S.C. 3664(u).

[58] Proposed 18 U.S.C. 3663(b)(2)(B).

[59] H.R. 845, sec. 5(a)(1), proposing repeal of 18 U.S.C. 1593, 2248, 2259, 2264, and 2327.

[60] 18 U.S.C. 3563(b), 3583(d), 43(c).

Qualifying Losses. Existing law treats the restitution for property losses in one way (return and/or payment of the lost value) and the restitution for crime-related physical injuries in another (coverage of medical expenses, costs of rehabilitation, funeral costs when victim has been killed, and the victims' expenses relating to their participation in the investigation and prosecution of the qualifying offense).[61]

H.R. 845 essentially merges the two, eliminating the distinction and expanding coverage. It calls for restitution regardless of the nature of the crime – fraud, property damage, or physical injury offenses.[62] Its vindication expenses clause runs parallel to existing law, but makes specific allowance to cover the costs of attorneys other than those employed by the government.[63] It carries forward the language under which restitution orders must include "in the case of an offense resulting in the death of the victim, an amount equal to the cost of necessary funeral and related services."[64] And it uses the same language to describe restitution for lost income, medical expenses, and the cost of rehabilitation – with a difference. Existing law makes them a matter of mandatory restitution only with respect to offenses involving physical injuries; H.R. 845 recognizes no such distinction.[65]

As noted earlier, H.R. 845 expressly repeals the individual restitution provisions now found in 18 U.S.C. 1593 (human trafficking), 2248 (sexual abuse), 2259 (sexual exploitation of children), 2264 (domestic violence), and 2327 (telemarketing fraud).[66] Since it extends mandatory restitution to all federal offenses, the most obvious implication of the amendment is the change in the type of losses which qualify for restitution.

For instance, the human trafficking, sexual abuse, sexual exploitation, and domestic violence sections in existing law cover necessary transportation, temporary housing, and child care expenses, as well as attorney fees, generally.[67] H.R. 845 only covers them when they are "incurred during participation in the investigation and prosecution of the offense or attendance at proceedings relating to the offense."[68]

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[61] 18 U.S.C. 3663A(b)(1), (2).

[62] Proposed 18 U.S.C. 3663(c)(2), (3), (4).

[63] "... lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense, *including attorneys' fees necessarily and reasonably incurred for representation of the victim except for payment of salaries of government lawyers* proposed 18 U.S.C. 3663(c)(5)(language added to existing law in italics).

[64] Proposed 18 U.S.C. 3663(c)(b); 18 U.S.C. 3663A(b)(3).

[65] "[I]n the case of an offense resulting in bodily injury to a victim – (A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment; (B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and (C) reimburse the victim for income lost by such victim as a result of such offense," 18 U.S.C. 3663A(b)(2).

[66] H.R. 845, §5(1).

[67] 18 U.S.C. 1593(b)(3), 2248(b)(3), 2259(b)(3), 2264(b)(3).

[68] Proposed 18 U.S.C. 3663(c)(5).

The trafficking section also has an income loss calculation unknown to the bill.[69] H.R. 845 leaves as they stand the individual features of 18 U.S.C. 43(c) (animal enterprise terrorism) which authorize restitution orders covering a range of economic damages that appear to be beyond H.R. 845's reach.

When H.R. 845 merges sections 3663 and 3663A into a revised Section 3663 it repeals sub silentio subsection 3663(c) which permits a restitution order in favor of state victim assistance and drug agencies upon a conviction for various controlled substance offenses.

With the merger, H.R. 845 presumably intends to bring individual restitution laws such as 18 U.S.C. 228(d) (failure to pay child support) which continue to cross reference Section 3663A within the coverage of the new Section 3663.[70] Those laws define the losses for which restitution may be ordered solely by their cross references to Section 3663A (repealed by the bill). Since the bill provides for mandatory restitution upon conviction for any federal offense, presumably including violations of 18 U.S.C. 228 and any other statute carrying similar obsolete baggage, the failure to adjust the references to Section 3663A may well be seen as a harmless scrivener's error.

S. 973 (Discretionary Restitution)

Qualifying Offenses. S. 973's expansion of authority to order restitution is far more selective than that of H.R. 845. Under 18 U.S.C. 3663 of present law, federal courts may, but need not, order restitution following conviction for crimes for which mandatory restitution is not required and which are proscribed in Title 18 of the United States Code and for various drug and aviation safety statutes.[71] S. 973 amends Section 3663 to permit a federal court to order restitution following conviction for any of a series of environmental crimes:

- 33 U.S.C. 1319(c)(2), (3) (Federal Water Pollution Control Act offenses);
- 33 U.S.C. 1415(b)(Marine Protection, Research, and Sanctuaries Act offenses);
- 33 U.S.C. 1908(a) (Act to Prevent Pollution from Ships offenses);
- 42 U.S.C. 300h-2, 300i-1 (Safe Drinking Water Act offenses);
- 42 U.S.C. 6928 (Solid Waste Disposal Act offenses); and
- 42 U.S.C. 7413(c)(1), (5) (Clean Air Act offenses).

The Justice Department's *Analysis* notes that in spite of the fact that various environmental felonies can result in economic loss, physical injury, and even death, restitution can only be awarded the victims of various environmental felonies as a

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[69] "As used in this subsection, the term 'full amount of the victim's losses' ...shall in addition include the greater of the gross income or value to the defendant of the victim's services or labor or the value of the victim's labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act (29 U.S.C. 201 et seq.)."

[70] 18 U.S.C. 228(d)("Upon a conviction under this section, the court shall order restitution under Section 3663A in an amount equal to the total unpaid support obligation as it exists at the time of sentencing.").

[71] 18 U.S.C. 3663. Restitution is mandatory following conviction for crimes of violence, property damage, fraud, and product tampering, 18 U.S.C. 3663A.

condition of probation or supervised release.[72] It also suggests that a close examination of the legislative history of 18 U.S.C. 3663 demonstrates that the rationale for excluding various economic and other regulatory offenses from the list of qualified offenses cannot easily be applied to the environmental offenses.[73]

Qualifying Losses. S. 973 amends the discretionary and mandatory restitution provisions of sections 3663 and 3663A to permit victims to recover related attorney fees, other than those of government attorneys, incurred in an effort to retrieve their damaged, lost, or stolen property.[74]

Procedural Adjustments (H.R. 845)

Primacy of Judicial Installment Schedules. The procedure for issuing a restitution order is laid out in 18 U.S.C. 3664. Following conviction, a probation officer conducts an investigation, collects information from the prosecutor, victims and defendant, and prepares a report for the court which is shared with the parties.[75] The court conducts a hearing to resolve any questions relating to whether a particular individual is a victim entitled to restitution, whether a particular loss is one that qualifies for restitution, and the specifics of the defendant's ability to pay.[76] Court-issued restitution orders may direct the defendant to pay in a lump sum, in installments, in-kind or in some combination of the three.[77] Until full restitution is made, the court may modify its order to reflect any change in the defendant's financial circumstances.[78]

The Justice Department contends that the role which the statute assigns to the courts impedes effective collection of restitution and has recommended amendments:

> [S]ome circuit courts of appeal have interpreted one clause in 18 U.S.C. 3664(f)(2) ... to require that a mandatory payment schedule be set at the time of sentencing. Therefore, the current legislative scheme impedes the effective enforcement of criminal monetary penalties, including restitution. The enforcement of restitution would be enhanced substantially if Congress were to amend 18 U.S.C. 3664(f)(2) to clarify that restitution is due immediately upon the imposition of a restitution order.... Another major change to the statute clarifies that a payment schedule set by a court at sentencing is only a minimum obligation of the offender. Current 18 U.S.C. 3664(f)(2) has undermined the efforts of the United States to enforce restitution because courts of appeal have interpreted it to require the imposition, at every sentencing, of an exclusive court-imposed payment plan. This limits the ability of the United States to enforce

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[72] *Analysis*, at 21.

[73] *Id*. at 22-3. Critics might respond that deficiencies in federal environmental laws might more appropriately be considered in the context of those laws rather than as an aspect of general criminal law enforcement.

[74] Proposed 18 U.S.C. 3663(b)(1)(B), (4), (6); proposed 18 U.S.C. 3663A(b)(1)(B), (4), (5).

[75] 18 U.S.C. 3664(a), (b), (d).

[76] 18 U.S.C. 3664(e)

[77] 18 U.S.C. 3664(f).

[78] 18 U.S.C. 3664(k).

> restitution using other available civil and administrative enforcement methods. As a result, district courts generally impose minimal payment plans upon the defendant that cannot thereafter be changed except by the court and upon a showing of a substantial change in the defendant's economic circumstances. *Letter* at 1.

The appellate decisions to which the *Letter* alludes have held that the sentencing court must set any installment payment schedule. It may not make "restitution due and payable immediately" when the defendant had no realistic means of complying. "Such an arrangement effectively transfers the district court's responsibility for setting a restitution schedule to the probation office [or to prison authorities], which is inconsistent with the statute."[79]

Both H.R. 845 and S. 973 amend Section 3664 to meet the Justice Department's objections. Section 3664(f) now states that "the court shall order restitution to each victim in full...."[80] And "the court *shall*, pursuant to Section 3572, specify in the restitution order the manner in which, the schedule according to which, the restitution is to be paid...."[81] Under H.R. 845, this language disappears and is replaced with a statement that "[u]pon determination of the amount of restitution owed to each victim, the court shall order that the full amount of restitution is *due and payable immediately*."[82] Furthermore "The court *may* provide for payment in installments according to a schedule...."[83] And "The Attorney General may collect and apply unreported or otherwise newly available assets to the payment of restitution, *without regard to any installment payment provisions*."[84]

All of which appears to mean that H.R. 845's amendments are intended to permit the court to establish a payment schedule, but to allow the government to formulate one if the court does not. Moreover, the fact that the court has established a payment schedule does not prevent the government from supplementing the effort

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[79] *United States v. Thigpen*, 456 F.3d 766, 771 (7th Cir. 2006)("[W]e explicitly oppose[ ] a district court's attempt to minimize its responsibility to set a restitution schedule by ordering 'immediate' payment. Such an arrangement effectively transfers the district court's responsibility for setting a restitution schedule to the probation office, which is inconsistent with the statute"); *see also, United States v. Ahidley*, 486 F.3d 1184, 1191-193 (10th Cir. 2007); *United States v. Gunning*, 401 F.3d 1145, 1149-150 (9th Cir. 2005); *United States v. Davis*, 306 F.3d 398, 425-26 (6th Cir. 2002); *United States v. Prouty*, 303 F.3d 1249, 1253-254 (11th Cir. 2002); *United States v. McGlothlin*, 249 F.3d 783, 784-85 (8th Cir. 2001); *United States v. Coates*, 178 F.3d 681, 685 (3d Cir. 1999); *United States v. Kinlock*, 174 F.3d 297, 301 (2d Cir. 1999).

[80] 18 U.S.C. 3664(f)(1)(A).

[81] 18 U.S.C. 3664(f)(2)(emphasis added). Section 3572(c)(1) provides that "A person sentenced to pay a fine or other monetary penalty, including restitution, shall make such payment immediately, unless, in the interest of justice, the court provides for payment on a date certain or in installments ... ." S. 973 amends Section 3572 and eliminates its application to restitution; H.R. 845 does not.

[82] Proposed 18 U.S.C. 3664(j)(1)(emphasis added).

[83] Proposed 18 U.S.C. 3664(j)(2)(emphasis added).

[84] Proposed 18 U.S.C. 3664(j)(4)(emphasis added).

with other collection measures taken without the need to seek the sentencing court's approval.

Presentencing Report. H.R. 845 amends Section 3664 in a number of other ways, some of which appear in the earlier recommendations of the Justice Department and some of which do not.[85] Present law gives the prosecutor 60 days prior to the date set for sentencing to supply the probation officer with a list of the victims of the crime of conviction and the amounts of their losses.[86] H.R. 845 relaxes the provision striking the time deadline.[87] Unlike existing law, it insists that the report be shared with victims upon their request.[88]

H.R. 845 drops the statement now found in Section 3664(c) that identifies the external provisions of law that govern the proceedings.[89] The omission may have been intended merely to eliminate a redundancy, but it may do a little more. Among the provisions now said to govern the proceedings is Rule 32(c)(2) of the Federal Rules of Criminal Procedure, which states that, "The probation officer who interviews a defendant as part of a presentence investigation must, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview."[90] The omission may have been intended to indicate that the probation officer is no longer required to invite the defendant's attorney to interviews with the defendant conducted for restitution information-gathering purposes. On the other hand, H.R. 845 neither repeals nor amends the Rule, and on its face it requires an invitation whether the presentence investigation interview is related to restitution or some other sentencing issue.

Restitution Orders. Under existing law, the court may consider a defendant's financial circumstances when deciding how and when restitution must be paid.[91] It may not consider them when deciding whether and in what amounts its must be paid.[92] Perhaps to avoid confusion, H.R. 845 strikes the language in Section 3664

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[85] S. 973's amendments to Section 3664 track the Justice Department proposed bill much more closely.

[86] 18 U.S.C. 3664(d)(1)("Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution")

[87] "The attorney for the government shall provide the probation officer any information the attorney for the government has relevant to the matters required to be reported under subsection (a) [preparation of the restitution report]," proposed 18 U.S.C. 3664(c). S. 973 has no comparable provision.

[88] Proposed 18 U.S.C. 3664(b). S. 973 has no comparable provision.

[89] "The provisions of this chapter [18 U.S.C. 3661-3673], chapter 227 [18 U.S.C. 3601-3626] and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section," 18 U.S.C. 3664(c). S. 973 leaves Section 3664(c) untouched.

[90] F.R.Crim.P. 32(c)(2).

[91] 18 U.S.C. 3664(f)(2).

[92] 18 U.S.C. 3664(f)(1)(A)("In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court, and

that now instructs the court to ignore the defendant's ability to pay when crafting the restitution order.[93] The general tenor of the bill, however, belies any intent to allow a court to reduce the amount of restitution it might otherwise award based on the defendant's economic circumstances.

As with existing law, the timing and scheduling of the defendant's restitution payments under the order must be based on the defendant's obligations and resources (present and anticipated).[94] The court may still make multiple defendants jointly and severally liable for restitution, although H.R. 845 prunes the court's authority to apportion restitution among multiple defendants.[95] In the case of multiple victims, H.R. 845 uses a compressed style to the same effect as existing law.[96] It uses the same approach when providing for restitution for insurance carriers and similarly situated third parties.[97]

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without consideration of the economic circumstances of the defendant.").

[93] 18 U.S.C. 3664(f)(1)(A)("In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court, and without consideration of the economic circumstances of the defendant"); proposed 18 U.S.C. 3664(j)(1)("Upon determination of the amount of restitution owed to each victim, the court shall order that the full amount of restitution is due and payable immediately.")

[94] That is based upon, "(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled; (B) projected earnings and other income of the defendant; and (C) any financial obligations of the defendant; including obligations to dependents," proposed 18 U.S.C. 3664(j)(2)(A)-(C); 18 U.S.C. 3664(f)(2)(A)-(C).

[95] 18 U.S.C. 3664(h)("If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant"); proposed 18 U.S.C. 3664(*l*)("If the offense involves more than one defendant, the court may order each defendant jointly and severally liable for any or all of the restitution."). S. 973 has no comparable provision.

"[B]eing jointly and severally liable means that each individual remains responsible for payment of the entire liability, so long as any part is unpaid," *United States v. Scop*, 940 F.2d 1004, 1010 (7th Cir. 1991), citing, RESTATEMENT (SECOND) OF TORTS §875 (1979).

[96] Proposed 18 U.S.C. 3664(p)("If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on their individual losses and economic circumstances. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution."); 18 U.S.C. 3664(i)("If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.")

[97] Proposed 18 U.S.C. 3664(n)("In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution. If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the

Defendants continue to have the opportunity and obligation to notify the court and the government of any change in their financial situation.[98] H.R. 845 adds a further requirement that victims notify the court if they change their name or mailing address.[99] It also amends existing law to prolong a defendant's probationary period and term of supervised release as long as restitution is still owed, although during the extension the obligation to pay restitution is the only condition that remains in effect.[100]

H.R. 845 accepts without change most of the existing mechanisms for enforcing restitution orders. This includes liens on the defendant's property that can be enforced either by the government or the victim,[101] the authority of probation officers to enforce in-kind restitution orders,[102] and the estoppel provision that precludes the defendant from challenging any of the underlying facts of the crime of conviction in related civil litigation.[103] In addition, H.R. 845 empowers the court to order the defendant to take action to facilitate restitution including the reparation of assets located overseas.[104] In a later section, it creates a new enforcement mechanism under

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compensation, but the restitution order shall provide that all victims be paid before such a provider of compensation."); 18 U.S.C. 3664(f)(1)(B)("In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution"); 18 U.S.C. 3664(j)(1)("If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.").

[98] Proposed 18 U.S.C. 3664(q); 18 U.S.C. 3664(k).

[99] Proposed 18U.S.C. 3664(r)("It is the responsibility of the victim to provide any change in name or mailing address to the court while restitution is still owed. Not later than 30 days after any change in name or mailing or residence address, a person owing restitution shall promptly report the change to the court. The confidentiality of any information relating to a victim shall be maintained."). The comparable provision in S. 973 gives victims the option of notifying the Attorney General instead and covers only the victim's change of address; there is no mention of a change of name, S. 973, proposed 18 U.S.C. 3664(f)(1)(C)(ii).

[100] Proposed 18 U.S.C. 3664(m)("A court shall not terminate a term of supervised release under section 3583(e) before the order to pay restitution has been completely satisfied. A court shall extend a term of supervised release beyond that otherwise imposed under other provisions of law, until the defendant has paid the restitution in full or the court determines the economic circumstances of the defendant do not allow the payment of any further restitution. Such determination is only for the purposes of this subsection and does not affect the obligation to pay restitution or the ability of any entity to enforce restitution under any other provision of law. If the supervised release is extended under this subsection, the court shall order that the sole condition of supervised release shall be payment of restitution."). Section 4 of H.R. 845 makes comparable adjustments in federal probation law, proposed 18 U.S.C. 3564(f). S. 973 has no comparable provisions.

[101] Proposed 18 U.S.C. 3664(s)(2), (3); 18 U.S.C. 3664(m)(1).

[102] Proposed 18 U.S.C. 3664(s)(3); 18 U.S.C. 3664(m)(2).

[103] Proposed 18 U.S.C. 3664(w); 18 U.S.C. 3664(*l*).

[104] Proposed 18 U.S.C. 3664(j)(3)("The court may direct the defendant to take any action, including the reparation of assets or the surrender of the interest of the defendant in any

which it vests the courts with authority to freeze the property of defendants and potential defendants before indictment or sentencing in order to ensure the preservation of their assets for restitution purposes.[105]

Procedural Adjustments (S. 973)

Enforcement Flexibility. Like H.R. 845, more than a few of S. 973's amendments have been crafted to provide alternatives to direct involvement of the court in restitution enforcement. Some address the courts' exclusive control of the scheduling of installment payments; others the availability of the Bureau of Prisons Inmate Financial Responsibility Programs; still others the collection authority of the government during the pendency of appeals.

The approach of S. 973 to judicial scheduling of installment payments is much like that of H.R. 845. S. 973 declares, "the court shall order that the restitution imposed is due in full immediately upon imposition."[106] The statement in existing law that "the court *shall* ... specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid"[107] gives way to a statement in S. 973 that, "the court *may* ... direct the defendant to make ... partial payments at specified intervals...."[108]

Inmate Financial Responsibility Program. This Bureau of Prisons program is designed to ensure that federal inmates meet their financial responsibilities and requires them to have a financial plan to meet those obligations from the money they earn from prison work assignments if nothing else.[109] Under the program's priority, court-ordered restitution payments rank second after special assessments.[110] Failure to comply with the demands of the program can result in a loss of various benefits and privileges.[111]

The Justice Department's *Analysis* claims that appellate decisions requiring sentencing courts to maintain control over installment payment plans "effectively prohibits the BOP from enforcing final restitution orders through its long established IFRPs."[112] Some may find this a bit of an overstatement, since some courts appear

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asset, in order to pay restitution in accordance with this section.").

[105] Proposed 18 U.S.C. 3664A.

[106] Proposed 18 U.S.C. 3664(f)(2).

[107] 18 U.S.C. 3664(f)(2)(emphasis added).

[108] Proposed 18 U.S.C. 3664(f)(6)(A)(emphasis added).

[109] 28 C.F.R. §545.10.

[110] 28 C.F.R. §545.11(a)(the priority is: (1) special assessments, (2) restitution orders; (3) fines and court costs, (4) satisfaction of state or local court orders such as orders to make child support or alimony payments, and (5) other federal obligations). Upon conviction, the courts are required to impose a special assessment of $100 for each felony and lesser amounts for misdemeanors, 18 U.S.C. 3013.

[111] 28 C.F.R. §545.11(d).

[112] "Some appeals courts have held, as a result of current subparagraph 3664(f)(2) described above, the district courts have the exclusive power to require payment. This effectively

to consider the Inmate Financial Responsibility Program an appropriate mechanism for enforcing inmate restitution obligations;[113] they merely read the statute to insist that the court rather than the Bureau of Prisons set the payment schedule.

In any event, S. 973 amends Section 3664 using language that appears to permit the court to delegate scheduling to prison officials, but also allows prison authorities to trump conflicting court instructions.[114] In addition, S. 973 amends the nominal installment payment feature in present law[115] to reflect the $100 per year minimum and priority of special assessments found in the prison program.[116] The Justice Department *Analysis* also anticipated that the change would revive what they believe has become a dormant nominal installment provision.[117]

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prohibits the BOP from enforcing final restitution orders through its long established IFRPs, on the theory that an IFRP trespasses upon the district court's sole power to enforce restitution obligations," *Analysis* at A-15.

[113] *See e.g.*, *United States v. Wilson*, 416 F.3d 1164, 1170-171 (10th Cir. 2005); *United States v. Kinlock*, 174 F.3d 297, 301 (2d Cir. 1999)("We have also noted that district courts may draw upon the Inmate Financial Responsibility Program guidelines ... in fashioning an order of restitution that specifies the amounts to be paid, so long as discretionary authority to depart from the court's order is not vested in prison officials .").

[114] Proposed 18 U.S.C. 3664(f)(9)("Court-imposed special payment directions shall not limit the ability of the Attorney General to maintain an Inmate Financial Responsibility Program that encourages sentenced inmates to meet their legitimate financial obligations"). H.R. 845 has no explicitly comparable provision, but it conveys broad authority that may lead to the same result (H.R. 845, proposed 18 U.S.C. 3664(j)(4)("The Attorney General may collect and apply unreported or otherwise newly available assets [e.g., pay for prison work] to the payment of restitution, without regard to any installment payment provisions.")).

[115] 18 U.S.C. 3664(f)(3)(B)("A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.").

[116] Proposed 18 U.S.C. 3664(f)(8)("(A) If the court finds that the economic circumstances of the defendant do not allow the payment of any substantial amount as restitution, the court may direct the defendant to make nominal payments of not less than $100 per year toward the restitution obligation. (B) Any money received from the defendant under subparagraph (A) shall be disbursed so that any outstanding assessment imposed under section 3013 is paid first in full."). 18 U.S.C. 3013 compels the court to impose a special assessment of $100 for every felony for which the defendants convicted and an assessment of lesser amounts for misdemeanors and infractions. The special assessment prior and the $25 quarterly minimum features of the Inmate Financial Responsibility Program appear in 28 C.F.R. §545.11(a)(1) and (b)(2) respectively.

[117] *Analysis* at A-15 ("The Department understands congressional intent to be that every defendant should pay full restitution immediately or, if that is not possible, as soon as reasonably possible. Even if a defendant cannot make reasonable payments towards his restitution obligation, then Congress expects the courts to require the defendant to make at least nominal, periodic payments toward his restitution obligation. However, the current statute is unclear. According to the statute, the court may 'direct the defendant to make nominal payments ... if the economic circumstances of the defendant do not allow the payment of any amount ...' As stated in *United States v. Kemp*, 938 F.Supp. 1554 (N.D.Ala. 1996), 'If the criminal is unable to make any payment, how can he make a nominal

Enforcement Pending Appeal. Under existing law, a prosecutor's options when enforcing a restitution order include the inmate financial responsibility program, liens against the defendant's property,[118] and garnishment of the defendant's wages or amounts in his pension plan.[119] A court, however, may stay execution of a restitution order pending appeal,[120] and "may issue any order reasonably necessary to ensure compliance with a restitution order" including posting of a bond, deposit with the registry of the court, an injunction, or a restraining order under Rule 38(e) of the Federal Rules of Criminal Procedure.[121] The law demands more rigorous protection when the payment of a fine is stayed. There the court must order the posting of a bond or a deposit with the registry of the court or impose a restraining order, except in exceptional circumstances.[122]

S. 973 dictates that any stay pending appeal that curtails a prosecutor's ability to enforce a restitution order in the interim must be for good cause stated on the record.[123] It also seems to narrow the court's discretion over the protective orders

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payment?' Because of the unclear language of the statute, courts rarely order nominal payments. This proposal will ensure that the statute implements Congressional intent.").

[118] 18 U.S.C. 3613(c)(" ... an order of restitution made pursuant to sections 2248, 2259, 2264, 2327, 3663, 3663A, or 3664 of this title, is a lien in favor of the United States on all property and rights to property of the person fined as if the liability of the person fined were a liability for a tax assessed under the Internal Revenue Code of 1986. The lien arises on the entry of judgment and continues for 20 years or until the liability is satisfied, remitted, set aside, or is terminated under subsection (b)").

[119] *United States v. Novak*, 476 F.3d 1041, 1044-53 (9th Cir. 2007). Section 3664(m)(1)(A) provides that, "An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or (ii) by all other available and reasonable means." Section 3613 found in subchapter B of chapter 229 makes all the provisions of that section "available to the United States for the enforcement of an order of restitution," 18 U.S.C. 3613(f). Section 3613(a) states that, "The United States may enforce a judgment imposing a fine in accordance with the practices and procedures for the enforcement of a civil judgment under federal law or state law," and it continues that with certain limited exceptions, "a judgment imposing a fine may be enforced against all property or rights to property of the person fined." The Federal Debt Collection Procedures Act, 28 U.S.C. ch. 176, is available to the federal government for enforcement of a civil judgment and consequently for enforcement of a restitution order. Garnishment is among the postjudgment enforcement mechanisms available under the Act, 28 U.S.C. 3205.

[120] F.R.Crim.P. 38(e)(1)("If the defendant appeals, the district court, or the court of appeals under Federal Rule of Appellate Procedure 8, may stay – on any terms considered appropriate – any sentence providing for restitution ...").

[121] F.R.Crim.P. 38(e)(2)("The court may issue any order reasonably necessary to ensure compliance with a restitution order ... after disposition of an appeal, including (A) a restraining order; (B) an injunction; (C) an order requiring the defendant to deposit all or part of any monetary restitution into the district court's registry; or (D) an order requiring the defendant to past a bond.").

[122] 18 U.S.C. 3572(g).

[123] Proposed 18 U.S.C. 3664(f)(10)(A)("The ability of the Attorney General to enforce restitution obligations ordered under paragraph (2) shall not be limited by appeal, or the possibility of a correction, modification, amendment, adjustment, or reimposition of a sentence, unless the court expressly so orders for good cause shown and stated on the

that may accompany a stay. Rule 38(e) affords the court the discretion to issue any protective order the court considers reasonably necessary. S. 973 uses the more demanding standard governing orders staying the payment of a fine pending appeal: mandatory protective measures except under exceptional circumstances.[124] Although S. 973 neither expressly repeals nor amends Rule 38(e), its amendment is rather clearly intended to supplant the Rule. In addition, S. 973 states that the issuance of such mandatory protective measures should not be construed as a limitation on the authority of prosecutors to continue their restitution-related investigations and enforcement efforts.[125]

The Justice Department materials describe the change but do not explain it.[126] To some extent the motivation is clear: secure restitution for victims as quickly as possible and prevent the loss of any assets that might be used to pay restitution. The materials do point out that in part the proposal for restitution pending appeal "parallels" the treatment of fines pending appeal under existing law.[127]

But the two may raise different considerations. For instance, if a defendant is vindicated on appeal, the government can be compelled to return the amount the defendant paid in fines pending appeal.[128] On the other hand, the government cannot be compelled to return amounts it recovered as restitution and passed on to victims, even if the defendant is subsequently vindicated on appeal.[129]

There is another difference. The law permits a court to forego imposition of a fine when it might otherwise impose a hardship. Thus, a court may refrain from imposing a fine when a defendant has insufficient resources to satisfy both fine and restitution obligations.[130] The Sentencing Guidelines state that the court need not impose a fine "where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine" or "imposition of a fine would unduly burden

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record."). H.R. 845 has no comparable provision.

[124] Proposed 18 U.S.C. 3664(f)(10)(B) ("Absent exceptional circumstances, as determined by the court, an order limiting the enforcement of restitution obligations shall – (i) require the defendant to deposit, in the registry of the district court, any amount of the restitution that is due; (ii) require the defendant to post a bond or other security to ensure payment of the restitution that is due; or (iii) impose additional restraints upon the defendant to prevent the defendant from transferring or dissipating assets").

[125] Proposed 18 U.S.C. 3664(f)(10)(C)("No order described in subparagraph (B) shall restrain the ability of the United States to continue its investigation of the defendant's financial circumstances, conduct discovery, record a lien, or seek any injunction or other relief from the court"). H.R. 845 has no comparable provision.

[126] *Letter* at 2; *Analysis*, at A-15 to A-16.

[127] *Analysis*, at A-15 to A-16.

[128] *United States v. Hayes*, 385 F.3d 1226, 1229 (9th Cir. 2004).

[129] *Id.* at 1229-230. It is unclear whether the government would hold funds acquired through the use of its expanded enforcement powers until appeals had been exhausted or risk the prospect of unseemly litigation by vindicated defendants to recover the funds from the victims to whom the government paid them.

[130] 18 U.S.C. 3572(b).

the defendant's dependents."[131] There are no such ameliorating provisions in the law of mandatory restitution. Therefore, the denial of stay pending appeal or an asset freeze pending appeal may impose greater hardships in the restitution cases than in fine cases.

The silence of the Justice Department materials may seem unfortunate in another respect. The materials do not further identify the type of "order described in subparagraph (B)"("an order limiting the enforcement of restitution obligations") that may not intrude upon a prosecutor's authority to conduct investigations of the defendant's finances, conduct discovery, record a lien, or seek any injunction.[132] It obviously includes a stay pending appeal, but the wording is sufficiently vague to be construed as a limitation on the sentencing court's authority to curtail enforcement of its restitution order. The clause has no statutory counterpart in present law whether of restitution or fines.

Prosecutors' Access to Information. Under the Federal Rules of Criminal Procedure, the probation officer's sentencing report may not include certain medical, confidential or informant-related material.[133] The Rules also forbid disclosing matters occurring before a federal grand jury, subject to certain exceptions, some which require court approval and some of which do not.[134] Various other statutes prohibit the disclosure of financial information but recognize an exception for information provided under grand jury subpoena.[135] Those statutes may be thought to proscribe disclosure beyond the grand jury absent some additional grant of authority. There are no statutory provisions which specifically proscribe Bureau of Prisons officials from disclosing to prosecutors information relating to an inmate's ability to pay restitution.

S. 973 grants the United States Attorneys access without court approval to financial information on the defendant held by a grand jury, the Probation Office, or

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[131] U.S.S.G. §5E1.2(a), (e).

[132] Proposed 18 U.S.C. 3664(f)(10)(C)("No order described in subparagraph (B) shall restrain the ability of the United States to continue its investigation of the defendant's financial circumstances, conduct discovery, record a lien, or seek any injunction or other relief from the court").

[133] F.R.Crim.P. 32(d)(3)("The presentence report must exclude: (A) any diagnostic opinions that, if disclosed, might seriously disrupt a program of rehabilitation; (B) any sources of information obtained upon a promise of confidentiality; or (C) any other information that, if disclosed, might result in physical or other harm to the defendant or others").

[134] F.R.Crim.P. 6(e). For example, foreign intelligence information unearthed by the grand jury may be reported to various federal authorities without prior court approval, F.R.Crim.P. 6(e)(3)(D), and the court may authorize disclosure of grand jury material for other judicial proceedings, F.R.Crim.P. 6(e)(3)(E)(i).

[135] E.g., 12 U.S.C. 3401("... no government authority may have access to or obtain copies of, or the information contained in the financial records of any customer form a financial institution unless the financial the financial records are reasonably described and ... (4) such financial records are disclosed in response to a judicial subpena which meets the requirements of section 3407 of this title...").

the Bureau of Prisons in order to enforce restitution orders.[136] The Justice Department has explained that the change is necessary because some district courts insist upon court approval before allowing prosecutors to examine probation officer reports on a defendant's financial condition.[137] They do not explain why explicit authority for access to grand jury material and Bureau of Prisons records is necessary or why court approval constitutes such a substantial obstacle.

Other Modifications. S. 973 amends Section 3664 in other ways. It makes it clear that victims are to receive a copy of the restitution order,[138] and requires victims to notify the court of any change in address, although it affords victims the option of notifying the Attorney General.[139]

S. 973 has several provisions designed to prevent the dissipation of assets following the issuance of the original restitution order. For instance, every restitution order must include an instruction that the defendant is to refrain from any action that would conceal or dissipate his assets.[140] The court in ordering restitution may direct the defendant bring crime-related property back to within the jurisdiction of the

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[136] Proposed 18 U.S.C. 3664(f)(5)("Notwithstanding any other provision of law, for the purpose of enforcing a restitution order, a United States Attorney may receive, without the need for a court order, any financial information concerning the defendant obtained by the grand jury that indicted the defendant for the crime for which restitution has been awarded, the United States Probation Office, or the Bureau of Prisons"). H.R. 845 has no comparable provision.

[137] "This provision is necessary because in some districts, financial information is provided only as approved by the judge who sentenced the defendant. In those districts where financial information obtained concerning the defendant is not routinely provided, efforts by prosecutors to identify all collectible criminal debt is impeded. While the court properly should restrict access to information to third parties, i.e., other litigants or private parties, the Untied States Attorney's Office ('USAO') is not a third party. A statute expressly providing access, to the USAO only, to financial information concerning the defendant obtained by the Probation Office, without the need for a special court order, would expedite the response process of the federal judiciary on an issue that is directly related to its mission. Information sought under this new provision would include such times as the affidavit the defendant is required to submit to the court under 18 U.S.C. 36643(d)(3), the Probation Office's Form 48A (Personal Financial Statement), and the defendant's monthly reports showing employment and income. It would not include the Probation Officer's analysis of the financial information or any of the Probation Officer's recommendations to the court," *Analysis* at A-13.

[138] Proposed 18 U.S.C. 3664(f)(1)(C)(i)(II). H.R. 845 has no comparable provision.

[139] Proposed 18 U.S.C. 3664(f)(1)(C)(ii). The comparable provision in H.R. 845 obligates victims to notify the court of any change in their names or mailing addresses H.R. 845, proposed 18 U.S.C. 3664(r)).

[140] Proposed 18 U.S.C. 3664(f)(3)("The court shall direct the defendant – (A) to make a good-faith effort to satisfy the restitution order in the shortest time in which full restitution can be reasonably made, and to refrain from taking any action that conceals or dissipates the defendant's assets or income; (B) to notify the court of any change in residence; and (C) to notify the United States Attorney for the district in which the defendant was sentenced of any change in residence, and of any material change in economic circumstances that might affect the defendant's ability to pay restitution"). H.R. 845 has no comparable provision.

court.[141] It may at any time enter a protective order to ensure the availability of assets for restitution purposes.[142] And it may craft or modify a restitution order to reflect the fact that the defendant has concealed or dissipated assets.[143]

Present law requires a defendant to apply any windfall he receives while in prison to his restitution obligations.[144] S. 973 adopts the requirement, but expands it to apply whenever restitution is outstanding regardless of whether the defendant is incarcerated at the time.[145] S. 973 provides a similar but more explicit and open ended list of factors for the court's consideration in assessing a defendant's ability to pay restitution[146] than found in existing law.[147]

H.R. 845/S. 973: Collection Act

S. 973 and H.R. 845 amend the Federal Debt Collection Procedure Act,[148] consistent with the Collection Act's availability as a means of enforcing restitution orders.[149] The Collection Act is primarily a means of enforcing debts owed the

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[141] Proposed 18 U.S.C. 3664(f)(6)(D)(i). It is unclear why repatriation should be limited to crime-related assets. The defendant's restitution obligations are not otherwise so limited; they reach his assets generally. The comparable provision in H.R. 845 has no such limitation (H.R. 845, proposed 18 U.S.C. 3664(j)(3)("The court may direct the defendant to take any action, including the reparation of assets ... in order pay restitution ...)).

[142] Proposed 18 U.S.C. 3664(f)(6)(E). H.R. 845 has no comparable provision.

[143] Proposed 18 U.S.C. 3664(f)(7)(A)(vi). H.R. 845 has no comparable provision.

[144] 18 U.S.C. 3664(n)("If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed").

[145] Proposed 18 U.S.C. 3664(f)(7)(B)("Any substantial resources from any source, including inheritance, settlement, or other judgment, shall be applied to any outstanding restitution obligation").

[146] Proposed 18 U.S.C. 3664(f)(7)(A)("In determining whether to impose or modify specific payment directions, the court may consider (i) the need to provide restitution to the victim of the crime; (ii) the financial ability of the defendant; (iii) the economic circumstances of the defendant, including the financial resources and other assets of the defendant and whether any of these assets are jointly controlled; (iv) projected earnings and other income of the defendant; (v) any financial obligations of the defendant; including obligations to dependents; (vi) whether the defendant has concealed or dissipated assets or income; and (vii) any other appropriate circumstances").

[147] 18 U.S.C. 3664(f)(2)("Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of – (A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled; (B) projected earnings and other income of the defendant; and (C) any financial obligations of the defendant; including obligations to dependents").

[148] 28 U.S.C. 3001-3308.

[149] The Collection Act applies to restitution enforcement by virtue of 18 U.S.C. 3664(m)(1)(A), 3613(f), and 3613(a); *see also*, *United States v. Novak*, 476 F.3d 1041, 1044-53 (9th Cir. 2007); 28 U.S.C. 3002 ("As used in this chapter... 'Debt' means... (B) an

United States arising in a civil or administrative context. S. 973 and H.R. 845 amend three sections within the act to specifically refer to restitution or debts arising out of criminal cases.[150] The amendment of Section 3004 goes a bit further. That section now permits a debtor to have an enforcement proceeding transferred to the district in which he lives. The bills amend the provision in criminal cases to permit the court in which the debtor was sentenced to block the transfer.[151]

H.R. 845/S. 973: Section 3664A (Preconviction Asset Freeze)

H.R. 845 and S. 973 add virtually identical asset preservation components to the restitution procedure in the form of a new 18 U.S.C. 3664A.[152] The asset preservation features of Section 3664A contemplate judicial asset freeze orders and other protective measures before conviction, both before and after indictment.[153] The procedure draws upon, and in part is modeled after, the protective order features of the criminal forfeiture section of the Controlled Substances Act.[154]

In some ways, the model may seem a less than perfect fit. The title to forfeitable property vests in the United States when the confiscation-triggering offense is committed.[155] Restitution has no comparable feature. At the time of the passage of the Controlled Substance Act, property used to facilitate the commission of a forfeiture-triggering offense could be confiscated in a civil proceeding upon a showing of probable cause.[156] And so it seems no great step to say that the court may

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amount that is owing to the United States on account of a ... fine, assessment, penalty, restitution...").

[150] Proposed 28 U.S.C. 3004(b)(2); 3101(a)(1), (d); 3202(b).

[151] Proposed 28 U.S.C. 3004(b)(2).

[152] There are two differences. S. 973 authorizes restraining orders if the court finds probable cause to believe that the "defendant, if convicted, *will be ordered to satisfy an order of restitution*." H.R. 845 authorizes restraining orders if the court finds probable cause to believe that "the defendant, if convicted, *will be ordered to pay an approximate amount of restitution*." H.R. 845 then adds a statement that the court's restraining-order assessment of the approximate amount of restitution owed should the defendant be convicted, does not limit is authority to order restitution in a different amount following conviction, proposed 18 U.S.C. 3664A(a)(2).

[153] Proposed 18 U.S.C. 3664A(b)(1)("In the case of a preindictment protective order entered under subsection (a)(1) ..."); proposed 3664A(b)(2)("In the case of a post-indictment protective order entered under subsection (a)(1) ...").

[154] 21 U.S.C. 853.

[155] 21 U.S.C. 853(c), 881(h).

[156] Property derived from or used to facilitate a violation of the Controlled Substances Act offense is subject to confiscation either in a civil proceeding conducted against the property, 21 U.S.C. 881, or in conjunction with the owner's criminal conviction, 21 U.S.C. 853. Civil forfeiture is ordinarily conducted in a proceeding in which the property is treated as the defendant. At the time when the Controlled Substances Act was passed and until fairly recently, confiscation was generally ordered upon a showing of probable cause to believe that the property was derived from or used to commit an offense for which confiscation might be had, *United States v. 3234 Washington Avenue North*, 480 F.3d 841, 843 (8th Cir. 2007); *United States v. One Harrington and Richardson Rifle, Model M-14, 7.62 Caliber*,

issue a property freeze order pending the outcome of a criminal trial, based on probable cause to believe that the property restrained constitutes the proceeds or instruments of a crime, when the court has authority to order the property confiscated civilly under the same probable cause standard. Restitution requires conviction of the property owner; civil forfeiture does not.[157] Restitution has no civil forfeiture equivalent.

The Controlled Substances Act permits the issuance of the protective order before the property owner has been charged with any offense.[158] So do H.R. 845 and S. 973.[159] Again in the case of the Controlled Substance Act, it may not seem like a great step to say the court can freeze property which it could order confiscated using the same or a less demanding standard of proof; but restitution has no civil forfeiture equivalent. Furthermore, even after indictment, the Controlled Substance Act ordinarily does not permit restraint of "innocent" assets, assets not associated with the commission of the offense.[160] H.R. 845 and S. 973 do.[161]

On the other hand, proponents might well point out that some of the differences between forfeiture and restitution argue for greater protective tools in the case of restitution. The government is the beneficiary of confiscation; the victims of crime are the beneficiaries of restitution. A victim is likely to feel the loss of restitution more sharply than the government will feel the loss of forfeitable property.

As for the availability of a civil forfeiture equivalent, proponents might note that under existing law authorities may use a search warrant to seize the fruits of crime

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378 F.3d 533, 534 (6th Cir. 2004); *United States v. Collado*, 348 F.3d 323, 326-27 (2d Cir. 2003). The government must now satisfy a preponderance of the evidence standard in most civil forfeiture cases, 18 U.S.C. 983(c). The innocence of the property owner is no defense and in fact is generally irrelevant unless the owner can establish that the confiscation-triggering offense was committed by someone else and without the owner's involvement, *Austin v. United States*, 509 U.S. 602, 618 (1993). In most instances, Congress has created an innocent owner defense to civil forfeiture when either the owner is an after the fact good faith purchaser, or is reasonably ignorance of the fact that his property was being used in a confiscation-triggering manner, or did all that could reasonably be expected to prevent his property from being used in a confiscation-triggering manner, 18 U.S.C. 983(d).

[157] *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974).

[158] 21 U.S.C. 853(e)(1)(B).

[159] Proposed 18 U.S.C. 3664A(b)(1), (a).

[160] Upon conviction, however, if forfeitable property has disappeared, been dissipated, or been removed to beyond the jurisdiction of the court, the court may order the confiscation of innocent property, other assets of the defendant of comparable value ("substitute assets"), 21 U.S.C. 853(p). Nevertheless, most courts have held that protective orders freezing such substitute assets may not be issued prior to conviction, *United States v. Patelidis*, 335 F.3d 226, 234 (3d Cir. 2003); *United States v. Gotti*, 155 F.3d 144, 147-49 (2d Cir. 1998); *United States v. Riley*, 78 F.3d 367, 371 (8th Cir. 1996);*United States v. Ripinsky*, 20 F.3d 359, 363-64 (9th Cir. 1994); *United States v. Floyd*, 992 F.2d 498, 502 (5th Cir. 1993); *contra*, *In re Billman*, 915 F.2d 916, 921 (4th Cir. 1990).

[161] Proposed 18 U.S.C. 3664A(a)(1)(A) calls for protective orders relating to property traceable to the offense charged; proposed 18 U.S.C. 3664A(a)(1)(B) calls for protective orders to preserve "any nonexempt asset" without regard to its relation to the offense.

based on the probable cause.[162] The protective orders envisioned in H.R. 845 and S. 973 either involved property traceable to a particular offense or can only be issued in the interest of justice.[163] They are not administrative commands, but are court-issued protective measures and come with the prospect of a judicial hearing to contest their issuance.[164]

The task of assessing the relative strengths and weaknesses of proposed Section 3664A is made more complicated by its occasional want of clarity. Notwithstanding the Justice Department's guidance, the text is sometimes perplexing. The bills authorize protective orders generally[165] and although they do not say so in so many words they clearly anticipate that protective measures will be available prior to conviction, both before and after indictment.[166] They call for protective orders in the case of traceable property and in the interest of justice:

> Upon the government's ex parte application and a finding of probable cause that a defendant, if convicted, will be ordered to pay an approximate amount of restitution for an offense punishable by imprisonment for more than one year, the court – (A) shall – (i) enter a restraining order or injunction; (ii) require the execution of a satisfactory performance bond; or (iii) taken any other action necessary to preserve the availability of any property traceable to the commission of the offense charged; and(B) if it determines that it is in the interests of justice to do so, shall issue any order necessary to preserve any nonexempt asset (as defined in section 3613) of the defendant that may be used to satisfy such restitution order. Proposed 18 U.S.C. 3664A(a)(1)(H.R. 845).

The Justice Department's *Analysis* of the proposal indicates that the Department believes: (1) that the paragraphs represent two distinct grants of authority, not one grant with two elements, each of which must be satisfied before the authority may be exercised; (2) that the difference between paragraph (A) and (B) is the difference between assets traceable to the crime charged (A) and those that are not (B); (3) that the measures described in (A)(i), (ii), and (iii) all apply to traceable property; (4) that the interest of justice standard applies to protective measures issued against property unrelated to the offense (B property), but not to the measures issued against traceable property (A property); and (5) that the court is obligated to issue the protective measures sought under (A) (traceable property) and, subject to an "interest of justice" determination, those under (B)(any property).[167]

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[162] F.R.Crim.P. 41(c)("A warrant may be issued for any of the following ...(2) contraband, fruits of crime, or other items illegally possessed... ").

[163] Proposed 18 U.S.C. 3664A(a).

[164] Proposed 18 U.S.C. 3664A(a), (b)(1), (2).

[165] Proposed 18 U.S.C. 3664A(a)(1).

[166] Proposed 18 U.S.C. 3664A(b)(1)("In the case of a preindictment protective order entered under subsection (a)(1) ..."); proposed 3664A(b)(2)("In the case of a post-indictment protective order entered under subsection (a)(1) ...").

[167] "Subsection (a)(1) makes explicit, as the courts have correctly held in construing section 853(e)(1), that such orders may be entered by the court *ex parte*, and that entry of such orders as to traceable assets upon proper application by the Government is intended by Congress to be mandatory... . In addition, subsection (a) provides that the court, if it determines that it is in the interests of justice to do so, must issue any order necessary to

It does not explain the apparent duplication. Perhaps the most plausible explanation is that the two are available to the government at its option. There might be some logic to the argument that the traceable property clause (A) is meant to apply in pre-indictment cases and the all-property clause (B) in post-indictment cases. After all, read that way pre-indictment orders, those which might to held the more demanding standard, would only reach the narrowest and least defensible of an individual's property – that traceable to a crime.

Yet the text fails to confirm such an interpretation when it refers to both pre- and post-indictment measures as those taken "under subsection (a)(1)" of which both (A) and (B) are a part.[168] More compelling still is the text of the traceable property clause (A) which authorizes protective measures for property "traceable to the commission of the offense *charged*."[169] The traceable property clause (A) can hardly apply exclusively to pre-indictment orders since prior to indictment there is no crime charged.

The hearing procedure intended in post-indictment cases seems to present further ambiguities. It seems fairly certain that the bills mean to establish the following procedure. Courts would be authorized to issue an ex parte protective order upon a probable cause showing that (1) the defendant had been indicted for an offense for which restitution might be ordered, (2) that the offense or offenses had resulted in qualified losses to qualified victims of an approximate amount for which the defendant would be obligated to make restitution if convicted of the offense or offenses charged, (3) the value of the property to be restrained or the amount of the bond to be posted did not greatly exceed the approximate amount of restitution that might be awarded, and (4) (perhaps) the property is traceable to the offense charged.

A defendant would be entitled to a hearing upon a prima facie showing that the value of property restrained or the amount of the bond greatly exceeded the amount of the restitution that could be ordered; or that the law does not authorize restitution for the offense, victim, or losses claimed in the order; or (if the court relies on the traceable property prong of proposed Section 3664A(a)(1)(A)) that the property restrained is not traceable to the offense charged. Even then, a hearing could be granted only if the defendant could also show by a preponderance of the evidence that the order had or would deprive him of defense counsel of his choice or deprive the defendant or his family of the necessities of life. If the defendant is able to meet this burden – or whatever reduced burden due process demands – he is entitled to a hearing at which the government may contest his challenge. After which, the court may modify its protective order should it find either (1) a want of probable cause to believe that the restrained property or at least all of it would be needed to satisfy any restitution order under the facts of the case; or (2) (if the "traceable property" authority was relied upon) a want of probable cause to believe that the restrained property or some of it is traceable to the offense charged, or (perhaps or at least to the extent due process requires); (3) that a failure to modify the order would deny the

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preserve *any* assets that may be used to satisfy such restitution order even if those assets are not traceable to the offenses charged," *Analysis* at A-18 to A-19 (emphasis added).

[168] Proposed 18 U.S.C. 3664A(b)(1), (2).

[169] Proposed 18 U.S.C. 3664A(a)(1)(A)(iii).

defendant defense counsel of his choice or would impose an undue hardship upon the defendant or his family.

The above description seems likely what S. 973 and H.R. 845 intend; it is not literally what they state. First, S. 973 states that the court shall issue a protective order upon "a finding of probable cause to believe that a defendant, if convicted, will be ordered *to satisfy an order of restitution*...."[170] It says nothing about the size of the anticipated restitution order nor about the relationship between the value of the restitution that might be owed to the value of the property to be restrained. H.R. 845 suggests this may have been an oversight, for the only change it makes in S. 973's treatment is to state that a court shall issue a protective order upon "a finding of probable cause to believe that a defendant, if convicted, will be ordered *to pay an approximate amount of restitution*...."[171] H.R. 845 says nothing about a necessary relationship between this "approximate amount" and the value of the property restrained, but otherwise there seems little reason to make the change. Both bills note that once their probable cause standards have been met a protective order covering traceable property may be issued; neither bill indicates what level of certainty is required for a finding that a particular piece of property is traceable to an offense charged.

Second, both bills state that the defendant is entitled to a hearing in which to seek a modification of the ex parte order only if he shows by a preponderance of the evidence that he has or will suffer hardship or lost defense counsel and if he "makes a prima facie showing that there is a bona fide reason to believe that the court's ex parte finding of probable cause under subsection (a)(1) was in error."[172] The text of S. 973 on its face limits the probable cause threshold to a showing that the court erroneously concluded that if convicted the defendant could be ordered to pay restitution. The defendant can literally overcome this obstacle only if he can show that restitution cannot lawfully be ordered because the offense is not one for which restitution may be ordered or because the case lacks either victims eligible for restitution or losses for which restitution may be awarded. If this were all that was intended there would be no reason to add the additional hardship threshold that S. 973 imposes.

The same is true of H.R. 845. Moreover, in the case of H.R. 845 the defendant must show that the court erroneously concluded that probable cause existed to believe that "the defendant, if convicted, will be ordered to pay an *approximate amount* of restitution."[173] There is no reason to insist on showing of an approximate amount of the possible restitution unless that determination somehow relates to the value of the property restrained if only very roughly.

Exactly how much more is intended or must be intended is complicated by the unresolved question of what due process requires. In the forfeiture context and as a matter of statutory construction, the Supreme Court indicated that the courts have no

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[170] S. 973, proposed 18 U.S.C. 3664A(a)(1).

[171] H.R. 845, proposed 18 U.S.C. 3664A(a)(1).

[172] Proposed 18 U.S.C. 3664A(b)(2)(B).

[173] Proposed 18 U.S.C. 3664A((b)(2)(B), (a)(1).

choice but to issue a protective order upon receipt of an ex parte government application following indictment even where the defendant seeks to use the assets to pay for legal representation.[174] The Court expressly left open the constitutional issue of when and what sort of hearing may be required as a matter of due process.[175] The issue divides the lower federal appellate courts. Some hold that a post-indictment ex parte restraining order is only good for ten days with the possibility of only one ten day extension before a probable cause hearing must be held.[176] Others find that "although pre-trial restraint of assets needed to retain counsel implicates the due process clause, the trial itself satisfies this requirement."[177] The majority are somewhere in between, but are particularly swayed when it appears that the order may reach funds needed to pay defense counsel.[178]

Third, once a hearing has been granted, the bills state that an order may be modified if "more property has been seized and restrained that may be *needed to*

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[174] "We note that the 'equitable discretion' that is given to the judge under §853(e)(1)(A) turns out to be no discretion at all as far as the issue before us is concerned: Judge Winter concludes that assets necessary to pay attorneys' fees must be excluded from the restraining order. For that purpose, the word 'may' becomes 'may not.' The discretion found in §853(e) becomes a command to use that subsection (and §853(c)) to frustrate the attainment of §853(a)'s ends. This construction is improvident. Whatever discretion Congress gave the district courts in §§853(e) and 853(c), that discretion must be cabined by the purposes for which Congress created it: 'to preserve the availability of property ... for forfeiture.' We cannot believe that Congress intended to permit the effectiveness of the powerful 'relation-back' provision of §853(c), and the comprehensive 'any property ... any proceeds' language of §853(a), to be nullified by any other construction of the statute," *United States v. Monsanto*, 491 U.S. 600, 613 (1989)(post-indictment restraining order).

[175] "We do not consider today, however, whether the Due Process Clause requires a hearing before a pretrial restraining order can be imposed." *Id*. at 615.

[176] *United States v. Roth*, 912 F.2d 1131, 1132-133 (9th Cir. 1990). Again, the question is made more difficult by virtue of the fact that in a forfeiture context . Beproperty that may restrained on a showing of probable cause could also be confiscated to the government on a showing of probable cause, i.e., without a conviction. The property subject to restraint under the bills cannot be made subject to a restitution order upon a showing of probable cause; a conviction is required.

[177] *United States v. Register*, 182 F.3d 820, 835 (11th Cir. 1999).

[178] *United States v. Holy Land Foundation*, ___ F.3d ___, ___ (5th Cir. 2007)(en banc) ("[W]hen the government is seeking forfeiture and secures an indictment to that effect based on probable cause, a court may issue a restraining order without prior notice or a hearing. In some cases, however, due process will require that the district court then promptly hold a hearing at which the property owner can contest the restraining order, without waiting until trial to do so." To determine when such a hearing is required, we consider the three *Eldridge* factors: the private interests that will be affected by the restraint; the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the government's interest, including the burdens that the hearing would entail... [C]ircuits employing this test have found that a property owner's interest is particularly great when he or she needs the restrained assets to pay for legal defense on associated criminal charges, or to cover ordinary and reasonable living expenses"); *United States v. Farmer*, 274 F.3d 800, 803-804 (4th Cir. 2001); *United States v. Jones*, 160 F.3d 641, 645-47 (10th Cir. 1998); *United States v. Monsanto*, 924 F.2d 1186, 1203 (2d Cir. 1991)(en banc).

satisfy a restitution order...."[179] They also permit modification if the court "finds under subparagraph (A) that no probable cause exists as to some or all of the property."[180] A subparagraph (A) hearing is conducted to "determine whether there is probable cause to believe that the defendant, if convicted, will be ordered to satisfy an order of restitution ... *and that the seized or restrained property may be needed to satisfy such restitution order*."[181] The italicized language suggests that some comparative analysis of the relative value of the assets frozen and restitution to be owed was necessary from the beginning when the court entered its ex parte order. Moreover, although neither bill makes any mention of it, either the text or due process will be construed to bar restraint of innocent assets (those not traceable to the offense charged) if needed to provide the necessities of life and perhaps if needed to retain counsel.

As for pre-indictment protective orders, the bills declare that applications and orders are to be governed by 21 U.S.C. 853(e) and proposed Section 3664A.[182] This should probably be understood to say that proposed Section 3664A governs in cases of conflict with Section 853(e). Prior to indictment, Section 853(e) requires that the property owner be given notice and an opportunity for a hearing,[183] unless the government establishes by probable cause that the property will become unavailable if prior notice is given.[184] The bills seem to make the initial issuance of the

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[179] Proposed 18 U.S.C. 3664A(b)(3).

[180] Proposed 18 U.S.C. 3664A(b)(3)(C).

[181] Proposed 18 U.S.C. 3664A(b)(3)(A).

[182] Proposed 18 U.S.C. 3664A(a)(2).

[183] 21 U.S.C. 853(e)(1)("Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section ... (B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that – (i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and (ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered: *Provided, however,* That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed").

[184] 21 U.S.C. 853(e)(2)("A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order").

restraining order ex parte in all cases.[185] Such ex parte restraining orders are temporary, good for only ten days unless extended for cause.[186] Absent an indictment, the restraining order is only good for ninety days, unless extended for cause.[187] Section 3664A does not describe the post-restraint hearing to be held in pre-indictment cases. Section 853(e)(1)(B) indicates that upon application of the United States, the court may enter protective orders to preserve the availability of property which the government asserts is subject to criminal forfeiture prior to indictment if it finds

> that – (i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and (ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.

Substituting the word "restitution" for "forfeiture," this is the likely description of the hearing the bills envision.

Most courts have held that protective orders freezing innocent assets under 21 U.S.C. 853(e) may not be issued prior to conviction.[188] Whether the bills intend to adopt this case law as part of their adoption of Section 853(e) is not clear.

Under the bills, an indicted defendant may not plead his innocence as the basis for lifting the restraining order.[189] Third parties may move for modification of a restraining order on the grounds of hardship and less onerous alternatives.[190] At least on the face of things, third parties may not move to have a restraining order modified

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[185] "Upon the government's ex parte application and a finding of probable cause ... the court shall – enter a restraining order ..." proposed 18 U.S.C. 3664A(a)(1). In the case of a preindictment protective order entered under subsection (a)(1), the defendant's right to a *post-restraint* hearing shall be governed by paragraphs (1)(B) and (2) of ... 21 U.S.C. 853(e)," proposed 18 U.S.C. 3664A(b)(1)(emphasis added).

[186] *Id.*

[187] 21 U.S.C. 853(e)(1).

[188] *United States v. Patelidis*, 335 F.3d 226, 234 (3d Cir. 2003); *United States v. Gotti*, 155 F.3d 144, 147-49 (2d Cir. 1998); *United States v. Riley*, 78 F.3d 367, 371 (8th Cir. 1996);*United States v. Ripinsky*, 20 F.3d 359, 363-64 (9th Cir. 1994); *United States v. Floyd*, 992 F.2d 498, 502 (5th Cir. 1993); *contra*, *In re Billman*, 915 F.2d 916, 921 (4th Cir. 1990).

[189] Proposed 18 U.S.C. 3664A(b)(5)("In any pretrial hearing on a protective order issued under subsection (a)(1), the court may not entertain challenges to the grand jury's finding of probable cause regarding the criminal offense giving rise to a potential restitution order ... ").

[190] Proposed 18 U.S.C. 3664A(c)(1), (2)("(1) A person other than the defendant who has a legal interest in property affected by a protective order issued under subsection (a)(1) may move to modify the order on the grounds that – (A) the order causes an immediate and irreparable hardship to the moving party; and (B) less intrusive means exist to preserve the property for the purpose of restitution. (2) If, after considering any rebuttal evidence offered by the government, the court determines that the moving party has made the showings required under paragraph (1), the court shall modify the order to mitigate the hardship, to the extent that it is possible to do so while preserving the asset for restitution").

on the grounds that the property restrained belongs to them rather than to the defendant, although they may do so at the conclusion of the criminal case.[191]

H.R. 845/S 973 (Anti-Crime Injunction Expansion)

Traditionally, the federal courts will not enjoin the commission of a crime unless expressly authorized to do so by statute.[192] As part of the Comprehensive Crime Control Act of 1984, Congress enacted 18 U.S.C. 1345 which authorized the federal courts to enjoin the commission of mail, bank, or wire fraud.[193] Over the years, it expanded the authorization to encompass false claims against the United States, conspiracies to defrauding the United States, false statements in a matter within the jurisdiction of a federal agency or department, securities fraud, banking law offenses, and health care crimes.[194] In 1990, it also authorize federal courts to freeze property derived from some of these offenses, namely, banking law or health care offenses.[195]

H.R. 845 and S. 973 each enlarge Section 1345 to authorize both injunctions and freeze orders relating to any federal offenses for which restitution might be ordered.[196] Their reach is somewhat different since their view of offenses for which restitution may be ordered is different. For H.R. 845, it is any federal offense which proximately causes another pecuniary loss.[197] For S. 973, it is the mandatory restitution crimes, that is, any federal crime of violence, crimes of fraud or property damage proscribed in Title 18, and product tampering,[198] as well as the discretionary restitution crimes, that is, any other crime proscribed in Title 18, various aircraft

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[191] Proposed 18 U.S.C. 3664A(c)(3)("(A) Except as provided in subparagraph (B) or paragraph (1), a person other than a defendant has no right to intervene in the criminal case to object to the entry of any order issued under this section or otherwise to object to an order directing a defendant to pay restitution. (B) If, at the conclusion of the criminal case, the court orders the defendant to use particular assets to satisfy an order of restitution (including assets that have been seized or restrained pursuant to this section) the court shall give persons other than the defendant the opportunity to object to the order on the ground that the property belonged in whole or in part to the third party and not to the defendant, as provided in section 413(n) of the Controlled Substances Act (21 U.S.C. 853(n))").

[192] *United States v. Santee Sioux Tribe*, 135 F.3d 558, 565 (8th Cir. 1998); cf., *United States v. Dixon*, 509 U.S. 688, 695 (1993)("[T]here was a long common law tradition against judicial orders prohibiting violation of the law. Injunctions, for example, would not issue to forbid infringement of criminal or civil laws, in the absence of some separate injury to private interests").

[193] 18 U.S.C. 1345 (1982 ed. (Supp.II)).

[194] 18 U.S.C. 1345, 1347.

[195] 18 U.S.C. 1345(a)(2).

[196] H.R. 845, proposed 18 U.S.C. 1345(a)(1), (2); S. 973, proposed 18 U.S.C. 1345(a)(1), (2).

[197] Proposed 18 U.S.C. 3663(a).

[198] 18 U.S.C. 3663A (mandatory restitution).

safety and drug offenses, and the environmental crimes that S. 973 adds to the restitution list.[199]

The Justice Department materials do not identify any particular reason why expansion would be necessary or useful. The failure to expand the authority to enjoin a wider range of criminal violations would not appear to have any obvious restitution consequences. Expanding the authority to issue restraining orders does have restitution consequences, but it is not clear what amending Section 1345 provides that is not or should not be addressed in the context of proposed Section 3664A .

S. 973 (Fine Collection)

S. 973 amends the fine collection language in Section 3572(d) so that it runs parallel to the bill's amendments relating to restitution collection.[200] H.R. 845 has no comparable provision. Present law directs that fines be paid immediately, unless in the interests of justice, the court authorizes an installment payment schedule.[201] Installment payments are to be scheduled to permit full payment as quickly as possible.[202] The defendant is obligated to inform the court of any change in his financial circumstances and the court may modify the order for payment accordingly.[203]

Following the pattern it uses for restitution, S. 973 eliminates the language that might suggest that the court has exclusive and predominant payment scheduling authority. In its place appears language that instructs the courts to order that "any fine or assessment imposed be due immediately;"[204] couches their installment payment scheduling authority in permissive ("may") rather than mandatory ("shall") terms;[205] and adds references to the special enforcement authority of the government.[206] As with restitution, S. 973 instructs the court to direct defendants to:

- pay their fines and assessments as quickly as is reasonably possible;
- avoid concealment or dissipation of assets or income;
- notify the court of any change of address; and

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[199] Proposed 18 U.S.C. 3663.

[200] Proposed 18 U.S.C. 3572(d).

[201] 18 U.S.C. 3572(d)(1).

[202] 18 U.S.C. 3572(d)(2).

[203] 18 U.S.C. 3572(d)(3).

[204] Proposed 18 U.S.C. 3572(d)(1).

[205] Proposed 18 U.S.C. 3572(d)(5)(" ... the court may – (i) impose special payment directions ... or (ii) direct the defendant to make a single, lump sum payment, or partial payments at specified intervals").

[206] Proposed 18 U.S.C. 3572(d)(9)("Court-imposed special payment directions shall not limit the ability of the Attorney General to maintain an Inmate Financial Responsibility Program ..."); proposed 18 U.S.C. 3572(d)(10)("(A) The ability of the Attorney General to enforce the fines and assessments order ... shall not be limited by appeal ... (B) Exceptions ... (C) No order described in subparagraph (B) shall restrain the ability of the United States to continue its investigation ...").

- notify the prosecutor of any change of address or financial circumstances.[207]

For purposes of fine and special assessment collection, by virtue of S. 973 prosecutors enjoy access, without the necessity of court approval, to financial information relating to the defendant and held by the grand jury, Probation Office, or Bureau of Prisons.[208]

S. 973 adds that the court may impose nominal payment schedules set at no less than $100 per year where the defendant's financial circumstances preclude a more substantial payment schedule.[209] It may also adjust these or any other payment schedules "at any time prior to the termination of a restitution obligation under Section 3613," which presumably means during the 20 year period following the defendant's release from prison or following sentencing if the defendant is not imprisoned.[210] The court may issue a restraining order or take other protection measures to prevent the scattering of assets that might be used to pay the defendant's fine.[211] It may also order the defendant to return scattered crime-generated assets[212] and perhaps to turn over non-exempt assets.[213]

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[207] Proposed 18 U.S.C. 3572(d)(2); *see also* proposed 18 U.S.C. 3572(d)(5)(B)("The period of time over which scheduled payments are established for purposes of this paragraph shall be the shortest time in which full payment can reasonably be made").

[208] Proposed 18 U.S.C. 3572(d)(4).

[209] Proposed 18 U.S.C. 3572(d)(8).

[210] Proposed 18 U.S.C. 3572(d)(5)(A). The uncertainty flows from the fact that Section 3613 does not have a completely unambiguous statement of the "termination of a restitution obligation." It does say that "[t]he liability to pay a *fine* shall terminate the later of 20 years from the entry of judgment or 20 years after the release form imprisonment of the person fined, or upon the death of the individual fined," 18 U.S.C. 3613(b)(emphasis added). And it states that section's authority is available to the government for the "enforcement" of restitution orders, 18 U.S.C. 3613(f). Although some may argue that does not necessary mean the fine termination dates in subsection 3613(b) apply, section 3613 treats them as if they do: "an order or restitution ... is a lien in favor the United States .... The lien arises on the entry of judgment and continues for 20 years ... or until the liability ... is terminated under subsection (b)," 18 U.S.C. 3613(c). On the other hand, if the termination dates for fines and restitution orders are the same under section 3613, why does S. 973 state that the court may modify its fine enforcement order up until the date for termination under Section 3613 for restitution orders (instead of for fines). The most logical explanation may be this was a simple drafting oversight; the phrase in proposed section 3572(d)(5)(A) should read "termination of a fine obligation under Section 3613" not "termination of a restitution obligation under Section 3613."

[211] Proposed 18 U.S.C. 3572(d)(5)(G).

[212] Proposed 18 U.S.C. 3572(d)(5)(C)("The court may direct the defendant to repatriate any property that constitutes proceeds of the offense of conviction, or property traceable to such proceeds "). It is not clear why the court should not be authorized to order the repatriation of any asset that might be used satisfy the obligation to pay a fine.

[213] Proposed 18 U.S.C. 3572(d)(5)(D)(emphasis added)("In ordering *restitution*, the court may direct the defendant to surrender to the United States any interest of the defendant in any non-exempt asset. This too may well be a drafting oversight where use of the word "fine" rather than "restitution" was intended. The non-exempt assets refer to those that do not qualify for exemption under section 3613, that is, assets qualify for the exemption under 26 U.S.C. 6334(a)(1), (2), (3), (4), (5), (6), (7), (8), (10), and (12) of the tax laws.

Finally, S. 973 describes the government's authority to enforce fines pending appeal in the same terms it used for restitution. A court may only stay the government's enforcement efforts for good cause.[214] If it issues a stay, unless faced with exceptional circumstances, it must issue an accompanying protective order except in exceptional circumstances.[215] Any such protective order, however, may not intrude upon the government's prerogatives to investigate the defendant's financial circumstances, conduct discovery, file a lien, or invoke the equitable powers of the court.[216]

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[214] 18 U.S.C. 3572(d)(10(A).

[215] 18 U.S.C. 3572(d)(10(B).

[216] 18 U.S.C. 3572(d)(10(C).